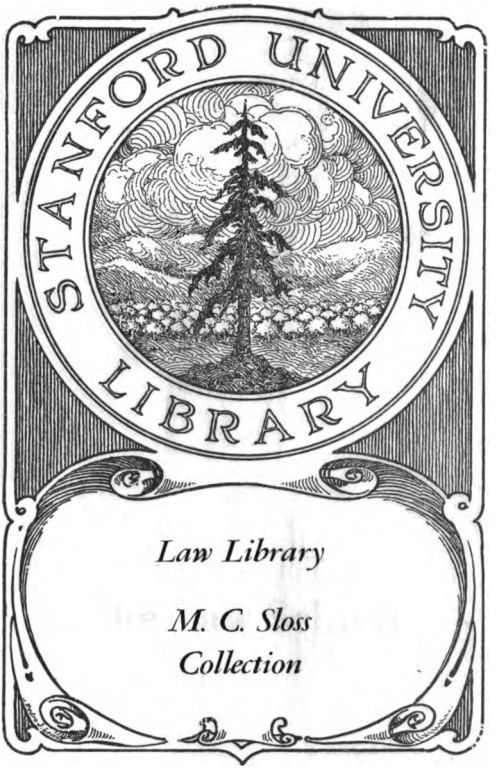

THE SOUTH AUSTRALIAN

LAW REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH AUSTRALIA

IN THE YEAR

1885.

EDITED BY

PERCIVAL RANDOLPH STOW

AND

MARK ATTENBOROUGH,

Practitioners of the Supreme Court.

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1888.

JUDGES OF THE SUPREME COURT:

THE HON. SAMUEL JAMES WAY, CHIEF JUSTICE.

THE HON. JAMES PENN BOUCAUT, SECOND JUDGE.

THE HON. WILLIAM HENRY BUNDEY, THIRD JUDGE.

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to my credit at the Savings or other Banks, together with all debts recoverable due to me shall be invested on mortgage or other secure and profitable investment; also the shares I hold in the National and Adelaide Banks; also all profits derived from land and household property, until sold, to be invested with other moneys until as each grandchild becomes of age, his or her share at the time shall be paid with an admonition as to its careful and profitable use, seeing that it cost their grandfather a lifetime of toil and care. The annual interest or profit on the whole of the mortgaged or secured amounts to be used first in paying the bequests before mentioned, and any necessary expenses incurred; and the remainder to be equally divided between my three children or in the event of death of either, then in manner before mentioned."

Held, under the devises and bequests hereinbefore set forth that—1. The children take the proceeds of sale of the real estate not otherwise specifically devised. 2. The profits of the real estate go until sale into the general personalty to be invested. 3. The children and their issue, *per stirpes*, take the income of the general fund, subject to the specific bequest, and that the grandchildren living at the time of the testator's death take the *corpus* by implication in equal shares *per capita*. 4. The unexpended portion of the second £52 a year disposable for the widow's benefit at the discretion of the trustees, and the accumulation of interest thereon go to the step-children. *Reynolds* v. *Reynolds* 113

2. WILL—*Construction—Life Interest—Direction void for uncertainty—Rule against perpetuities.* A testator directed that his wife and his six children named in his will should each be paid one-tenth part of the net rents of his real estate, and upon the decease of his wife, and also upon the decease of any of his children without issue, her or his share or proportion in the said net rents should be equally divided between the remaining children; but should any of his sons or daughters die, leaving one or more children, then the share or proportion which he or she (his said son or daughter) so dying was entitled to under his will should be equally divided between the survivor or survivors of them, their children or child; and if but one, the whole share or proportion to be in trust for such one child absolutely. He further directed that the balance, or remaining three-tenths of the net proceeds of the said rents, should be applied and expended in the erection of one or more houses upon certain land of his in Adelaide until the whole should have been built upon, the rents and profits arising from such buildings, as also the three-tenths of the rents theretofore reserved, to be paid to his wife and them his said children then living, in like proportions and like manner as theretofore mentioned. At the time of this action the wife and all the children of the testator were living.

Held, that the direction to build was void for uncertainty, because there was no direction as to the character of the houses to be built, and as being contrary to the law against perpetuities.

Held, further, that the wife and six children took a life interest in seven-tenths of the property between them, and that upon the death of the widow or of any of his children their life interest was to go to the survivors if they left no issue, but leaving issue was to go to such issue, subject to a gift over in remainder to the grandchildren of the testator.

CASES

DETERMINED IN THE

SUPREME COURT OF SOUTH AUSTRALIA

In the Supreme Court.—Criminal Jurisdiction.

BOUCAUT, J.

1885
February 19.

REGINA *v.* HOWELL.

Accused Persons Evidence Act, No. 245 *of* 1882

If a prisoner be sworn, he may be asked on cross-examination as to previous convictions.

RICHARD HOWELL, charged with assault, was sworn, and in cross-examination was asked a question as to previous convictions against him.

[BOUCAUT, J., thought that such questions ought not to be put, as prisoner might injure himself by replying to them.]

The Crown Solicitor (*Mann, Q.C.*) referred to the Accused Persons Evidence Act 1882, s. 5, providing that such person shall be liable to be cross-examined as in the case of any other witness.

Smith, W. V., for the prisoner.

BOUCAUT, J., decided that the section contemplated such a case, and allowed the question.

FULL COURT
WAY, C.J., and BOUCAUT and BUNDEY, JJ.

In the Supreme Court.—In Banco.

BASTARD *v.* MARSHALL.

1885
March 24.

Bill of Sale—Memorial of Registration—Evidence—Registration Act, No. 8, *of* 1841, *ss.* 23 *and* 28.

A certificate by the Registrar endorsed on a bill of sale is *primâ facie* evidence of the due registration of such bill of sale without production of the memorial.

SPECIAL case from the Local Court of Gladstone.

One Yates gave to the Defendant Marshall bills of sale; Yates became insolvent. Marshall having seized under the bills of sale, was sued by Bastard, as Official Receiver of the Insolvency Court at Gladstone, for the value of the goods seized and sold. Bills of sale produced, with certificate endorsed of registration, but memorial not produced.

Fleming for Plaintiff—Under the Registration Act 1841, s. 28, the bills of sale have not been proved. The reference made in s. 23 to the production of certificates being sufficient evidence has nothing to do with bills of sale, but only relates to conveyances.

Mann, Q.C., C.S., for Defendant.—*Contra.*

WAY, C.J.—The bills of sale only were put in evidence, and the memorials required by the Registration Act in order to give them validity were not produced. The Defendant relied on the certificates of registration on the backs of the bills of sale, and the Local Court held that a certificate on any instrument was conclusive of the correctness of registration. Mr. Fleming contended that certificates on bills of sale were to be treated differently from certificates of registration of deeds relating to real property, and he stated that the learned S.M. who presided in the Adelaide Local Court had held that the provision as to their conclusiveness was not applicable to bills of sale, but there is no reason why a certificate on the back of a bill of sale should not be equally potent as a certificate on the back of a conveyance.

BOUCAUT, J.—I have always understood that the production of an instrument with a certificate of registration endorsed was *primâ facie* evidence that it was properly registered. In this case it would lie on Mr. Fleming to produce the memorial to show that the bills of sale were not properly registered.

BUNDEY, J., concurred.

In the Supreme Court.—In Banco.

FULL COURT
WAY, C.J., and BOUCAUT and BUNDEY, JJ.

WALLACE AND ANOTHER *v.* PETIT.

Local Court Act 1861, *s.* 36—*Trial—Demand of Jury.*

1885
March 24.

In a case to be tried in the Local Court, a jury may be demanded seven days before the actual day of trial.

SPECIAL case from Local Court of Port Adelaide.

Petit, the Defendant, appeared on the 5th of March, 1884, to an action brought against him by the Plaintiffs, and the case was adjourned to the 21st of April. On the 10th of April the Defendant demanded a jury, but the S.M. decided that the demand had come too late.

J. H. Symon, Q.C., for the Plaintiff—The demand must be seven clear days before the day originally fixed for the hearing. *Saunders* v. *Hains* (1 S.A.L.R., 62 note).

H. E. Downer for Defendant—The words of the Act are permissive, and should be interpreted liberally.

WAY, C.J.—I think the day of trial refers only to the day on which the case is to be heard, whether it be the day originally fixed or a day to which the trial is adjourned. The Defendant's demand was therefore in time, and the action must be tried by a jury.

BOUCAUT, J.—I agree with what has been said by His Honor the Chief Justice. I think the decision in *Saunders* v. *Hains* was wrong, and I am not prepared to follow it.

BUNDEY, J.—I concur with my learned colleagues.

Order for trial of cause by a jury.

FULL COURT
WAY, C.J., and BUNDEY, J.

In the Supreme Court.—In Banco.

THE QUEEN *v.* MONTANA.

1885 March 25.

Criminal Law Consolidation Act, No. 387 of 1876 s. 377—Admissibility of testimony of child under ten—Knowledge of truth.

Section 377 of the Criminal Law Consolidation Act provides that in every prosecution for felony or misdemeanor, the testimony of a child under ten years may be received without any formality, except that the Judge shall, before admitting such testimony, explain to the child that he or she is required to truthfully tell what he or she knows about the matter to which his or her testimony relates.

Held, under this section that the evidence of a child who stated that she did not know the difference between truth and falsehood was not admissible.

CASE reserved from the Criminal Court by Boucaut, J.

The facts are shortly as follows:—The prisoner Montana was charged with carnally knowing and abusing a girl under twelve years of age. He confessed having committed the offence to his master, who promised he would let him go free if he told the truth. Prisoner afterwards admitted the accuracy of the confession before the Magistrate, after having been cautioned by him. At the trial objection was taken to the admission before the Magistrate being received in evidence, and that the evidence of the girl herself was not receivable under the section, inasmuch as she stated in answer to a question of the learned presiding Judge, that she did not know the difference between truth and falsehood.

BOUCAUT, J., at the request of the Crown Solicitor, received the girl's evidence, but reserved a case as to its admissibility under the section.

The Crown Solicitor (*Mann, Q.C.*) for Crown, contended that s. 377 was especially framed to meet a case like the present. It was the duty of the Judge to explain the difference between truth and falsehood to the child, and that having been done the evidence was admissible under the section of the Act.

Cur. ad vult.

April 21. WAY, C.J.—This is a case reserved by Mr. Justice Boucaut at the February Criminal Sittings. The prisoner was charged with carnally knowing and abusing a girl under twelve years of age, and two points arose upon the trial, the first of which was disposed of during the argument. The prisoner had made confession to his master, the prosecutor, under promise of forgiveness, and he admitted the accuracy of the confession before the Magistrate after being cautioned by him. The confession itself was not receivable in

evidence; but there was no reason why the admission which the prisoner made should not be received. The second and more important point, as to which we took time to consider, was with respect to the admissibility of the evidence of the little girl, who was a child under six years of age. The original rule as to the admissibility of the evidence of children appeared to have been that the evidence of children in a few instances of nine years of age, but not generally under ten years of age, was admissible. The stringency of this rule was afterwards relaxed, and the test as to the admissibility of a child's evidence was its being able to give a coherent account of the incidents it had to relate, and to distinguish between right and wrong. Of course the child's evidence was not receivable except under the sanction of an oath. It appears to me that the object of the Legislature in the provision contained in the 377th section of the Criminal Law Consolidation Act was simply to dispense with the oath, and not to do away with the other requisition that the child should be able to distinguish between right and wrong. To distinguish between right and wrong in cases like this means to distinguish between truth and falsehood. In this case, according to the learned Judge, the little child did not know the difference between truth and falsehood, nor what truth meant nor what falsehood meant. Under these circumstances the learned Judge found it impossible to do what is required by section 377, to explain to her that "she is required to truthfully tell what she knows about the "matter." In my opinion her evidence was therefore inadmissible. I regret this very much, but the evidence was received by the learned Judge on being pressed by the Crown Prosecutor, on the understanding that this case should be reserved. The evidence of the little girl not being properly admissible the case for the Crown fails, and the prisoner must be discharged.

BUNDEY, J.—By the English law the competency of children to give evidence is not now regulated by their age, but by the degree of understanding which they appear to possess. In England children of any age, if capable of distinguishing between good and evil, may be examined upon oath, but to entitle them to be sworn they must have received some religious instruction. *Roscoe's Crim. Evid.* (10 Ed. 115), and cases there cited. In South Australia the Legislature has, as I venture to think, wisely dispensed with the necessity of an oath, for a child with sufficient intellect may be enabled to give intelligent evidence, but yet, from defect of religious instruc-

FULL COURT
1885
THE QUEEN v. MONTANA.
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tion, be unable to comprehend the nature of an oath or the consequences of falsehood. But the Act referred to provides that the presiding Judge shall, "before receiving such testimony, explain to "such child that he or she is required to truthfully tell what he or "she knows about the matter to which his or her testimony relates." Taking the words of this clause, and applying them literally, we should—if the contention for the Crown is to be upheld—in effect decide that a man upon trial for his life would be liable to be convicted upon the unsupported testimony of a little prattler of two or three years old, whether the child has or has not been taught anything about truth or falsehood. How easily the credulity of such children might be imposed upon, and the consequences that might arise from such a construction are so obvious that it is unnecessary to call attention to them. On the other hand, unless children's statements are readily receivable—especially in cases similar to that now under consideration—guilty men may escape punishment for committing one of the worst of offences. There is, however, a remedy for the latter difficulty. Parents and others can teach children the difference between truth and untruth, and undoubtedly the great majority are so taught in this colony; whereas, if innocent men are convicted, relief may often be impossible. On a careful perusal of the section to which I have already called attention, and bearing in mind the then state of the law upon the subject, I am of opinion that the Legislature intended to remove the difficulty of obtaining convictions that previous to this Act often arose through rejecting the testimony of children, because they did not understand the nature of an oath, and to provide means of obtaining truthful and reliable evidence without its sanction, but they did not relieve the Judge from his usual responsibility of deciding upon the competency of the witness to testify, that once decided upon and the evidence received, the jury alone are to determine upon its credibility. To hold otherwise would, as it seems to me, render meaningless the obligation cast upon the Judge to "explain to a child that he or she is required to "truthfully tell what he or she knows about the matter to which his or "her testimony relates," and if upon such explanation he finds, as my learned colleague found in this case, incapacity to understand what is said, and that the child knows no difference between truth and untruth, to reject such testimony on the ground of incompetency. No doubt some children of very tender years are most truthful and intelligent witnesses—often more so than those much older—and the

age of a child is by no means the test; the test in this colony is their competency to understand that it is their duty to speak the truth, and this in all cases is to be ascertained by the Judge as a preliminary step. In England a child six years old was allowed to be sworn and to testify as to a rape having been committed on her, she having stated to the Judge that she said her prayers and thought it was wrong to tell lies. *Reg.* v. *Holmes* (2 F. & F. 788). In that case (the nearest in resemblance to the one before us I have read) the child's evidence was received because it complied with both the requisites of the English law, viz., she possessed the necessary understanding and had received a sufficient share of religious instruction. The distinction between the case just referred to and that now under our consideration has already been pointed out. The Colonial Legislature has dispensed with the religious test, but a sufficient understanding of the difference between telling a falsehood and telling the truth is as necessary here as in England to entitle such evidence to be received. In this case it is clear no such understanding did exist, and therefore I think the evidence was not properly receivable, and am reluctantly forced to the conclusion that the conviction must be quashed.

Conviction quashed.

BOUCAUT, J.

1885
May 6 and 7.

In the Supreme Court.

ROWELL AND OTHERS *v.* KEATS AND OTHERS.

Trustees—Breach of Trust—Appointment of New Trustees—Liability of Retiring Trustees for Breach by New Trustee—Lease under Real Property Act.

R. made his will, whereof he appointed K. and M. trustees, and devised to them certain properties upon trust for his widow for life, and after her death to be sold and the proceeds divided between the Plaintiffs and other persons. The widow and K. being desirous of granting a lease to K. of part of the trust property K. resigned the trusteeship and W. was appointed in his stead. The land was brought under the Real Property Act in the names of M. and W. and a lease was made to K.

Held, that the making of the lease was a breach of trust and that the retiring trustee, the continuing trustee, and the new trustee were all liable for any damage sustained by the beneficiaries.

THIS was an action brought by several of the residuary legatees under the will of the late Joseph Rowell against James Keats, a former trustee, and Charles Woods, and Arthur Messenger, the present trustees of the testator's will, to obtain the removal of Woods and Messenger from the trusteeship of the will, and claiming that new trustees might be appointed in their stead, and that the three Defendants might be charged with all loss and damage which the testator's residuary estate had sustained by reason of the Defendants Woods and Messenger having granted a lease of part of the trust property to Keats, who had retired from the trusteeship of the testator's will in order that the lease might be granted. It appeared that the property had been brought under the Real Property Act in order that certain difficulties in the way of granting a lease under the old system of conveyancing might be got rid of.

J. W. Downer, Q.C., for the Plaintiffs—The Defendants have been guilty of a breach of trust. Keats resigned the trusteeship and Woods was appointed in his place by fraud and collusion between the Defendants for the sole purpose of enabling Keats to obtain a lease of the premises at a gross undervalue.

Farr for Keats—The lease was not for the benefit of Keats, but was made at the suggestion of testator's widow.

C. C. Kingston, A.G., for Messenger and Woods—The position of the Defendants Messenger and Woods is altogether different from Keats. In granting the lease they thought they were doing what the widow had a right to insist on their doing. Keats had to pay all outgoings and to fence the land. Messenger and Woods had full power to let

during the continuance of the widow's life by virtue of her life estate.

[BOUCAUT, J.—It seems that according to the testator's will the trustees had no power to give a lease which would be inconsistent with their duty to sell and convert after her death.]

Downer, in reply—The land was brought under the Real Property Act in order to allow of the lease.

BOUCAUT, J.—I feel it to be my duty to decree against the three Defendants in respect of all the matters alleged. The facts are very simple. Joseph Rowell made a will and died. Keats and Messenger were trustees, and Mrs. Rowell, the widow, had a life estate. On her decease the property was to be sold and the proceeds divided between the Plaintiffs and others. That being the case the duty of Keats and Messenger was clear to demonstration. It was their duty to manage the estate, having in view the relative interests of the widow and the Plaintiffs and others. It entered into the minds of the widow and Keats, the trustee, who was her son and the step-son of the testator, that it would be more beneficial if he could have some better interest in the property, and for that purpose Keats took the lease. Now it was perfectly clear that no trustee could gain by his trusteeship. He could not take a lease under it and he could not gain by it. In order to infringe and break through that rule of law they went through the very shallow device of removing this trustee Keats and putting in another person to commit a breach of trust. The facts were too clear. Courts of Equity, in dealing with trustees, had always severely visited such practices. In the case of *Palairet* v. *Carew* (31 Beavan, 567) the Master of the Rolls said that "if a trustee be called upon to commit "a breach of trust and refuse, and his *cestuis que trustent* say, "'There is A.B. who will; will you resign and surrender your trust to "him?' and the old trustee accede to that proposal and transfers the "property to the new trustee for the purpose of enabling him to "commit a breach of trust, in that case the old trustee would probably "be visited very severely by the Court." It was argued by the Attorney-General that the lease was granted for the benefit of the widow, while Mr. Downer contended that it was granted for the benefit of Keats, the trustee. Rowell, the Plaintiff, said that Woods, the new trustee, told him that he wished he had nothing to do with the matter, and that the "old lady had done it to give her son a lift." Keats in his evidence corroborated this. The interest of the widow was not considered, but even if it had been the trustees had no right

BOUCAUT, J. 1885 ROWELL and OTHERS v. KEATS and OTHERS.

to ignore the interests of the Plaintiffs. As it was the lease was granted in Keats' interest, and that being so this Court was called upon to visit the trustees with the utmost justice in favor of the persons injured. In order to carry out this scheme the device was adopted that this land should be brought under the Real Property Act, as the lease could not be legally or honestly made under the old system of the law. No doubt the cases shewed some of the most admirable facilities which the Real Property Act supplied in cases of the kind, but unfortunately the Act also supplied an occasional facility for dealing with land dishonestly—a fact which was worthy of the attention of persons who dealt under the Act. As to the conduct of Mr. David Tweedie, the land broker, who had been engaged to bring the land under the Real Property Act, I shall not say anything as he is not before me, but if a solicitor of this Court had been consulted in reference to the devising and planning of that scheme I should greatly refrain from my judicial duty if I did not visit him in terms of the severest condemnation for being a party to such a breach of trust. Mr. Tweedie was not a solicitor, and therefore I do not pronounce anything upon what he did. However, for the protection of the public, I must call attention to the case of *The Rhosina* (L.R. 10 P.D. 29), in which Sir James Hannam alluded to certain cases as having "sufficiently established the principle "that if a man had a peculiar knowledge and he offered his services "to another person he was liable for gross negligence whilst "performing his undertaking. I think it well to read this, because if gentlemen undertake a duty such as conveyancing it was their duty not to devise a scheme that was deliberately wrong on the face of it, but rather to discountenance such a thing, whether they were solicitors of this Court or not. I think it my duty to say that. If he were a solicitor, Mr. Tweedie would probably have been made a party to the bill, and possibly have suffered the whole of the loss, as being the person by whom the scheme was matured and carried into execution. Then the case shewed that the Plaintiffs had been deprived of their land. The Attorney-General had spoken of the delay in bringing the action, but it appeared as soon as the old lady died the Plaintiffs consulted a solicitor. In the case of *Three Town Banks Co.* v. *Maddever* (52 L.T. N.S. 35) it was decided that a delay of ten years was no bar, although the Plaintiffs knew of the fraud all the time and gave no satisfactory explanation of the delay. The difficulty I have is in fixing the accurate value of the property.

It is clear that it is the bounden duty of this Court in so reckless a case to give the Plaintiffs every possible opportunity of getting the fair value of the land fixed, more especially as by the scheme adopted the Plaintiffs were prevented from getting their land for the twenty-one years. Mr. W. Wadham, one of the witnesses called for the Plaintiffs, deposed that the land might have sold for £2,080 at the time of the death of the old lady, and he had fixed £870 as the amount which the Plaintiffs had been deprived of, after making all allowances. I am not quite certain that Mr. Wadham has not given the utmost possible penny without reasonable allowances. I must take into consideration the fact that the two trustees acted with what they thought good motives and in ignorance. It will be referred to a Judge in Chambers to settle the amount of compensation.

The judgment was:—1. *Declare the making of the lease by the Defendants a breach of trust.* 2. *Messenger and Woods to be removed from the trusteeship.* 3. *Appoint new trustees, to be approved by the Judge.* 4. *The Defendants Keats, Messenger, and Woods to pay into Court such sum as shall be fixed by the Judge after taking further evidence of the value of the land.* 5. *Costs against the three Defendants.*

FULL COURT
WAY, C.J., and BOUCAUT and BUNDEY, JJ.

1885
May 11 and 12.

In the Supreme Court.—In Banco.

IN THE MATTER OF ALEXANDER FREDERICK FISHER, AN INSOLVENT.

Insolvent Act 1860, *s.* 125—*Offences—Omitting to keep proper books of account, and keeping books imperfectly—Withholding entries from books—Intent.*

The insolvent was in business as a bark and hide merchant. He kept books of account which appeared to record his business transactions fairly accurately to July 18th, 1882. From that date until February 17th, 1883, the Insolvent was in the habit of cashing the cheques he received from his various business debtors, and handing over whatever balance was required to meet his current cheques drawn on his banking account to his bookkeeper to be paid into the bank. These transactions appeared in the cash-book as "Cash, A. F. Fisher." During this period his books did not record properly his business transactions, and it was impossible to ascertain what he received or what he paid. He led an extravagant life, and engaged largely in horse-racing and betting. He also speculated in land and other affairs, and he kept no record of this expenditure. On February 17th, 1883, he collected £874 from his debtors and absconded to Sydney, where he met one Dendy, his partner in a grazing business at Milang, and divided the proceeds with him, leaving a deficiency in his estate of over £8,500. He personally entered a record of the moneys he collected in his books, with the exception of an item of £220 received by him for the sale of a bark mill and shed. Some time afterwards he returned to the province penniless.

Held, that the Insolvent was properly convicted of wilfully and with intent to conceal the true state of his affairs, omitting to keep proper books of account, and of wilfully with the like intent keeping his books improperly, negligently, and carelessly, and of withholding the entry of £220 from his books with intent to conceal the state of his affairs.

Held, also, that wilful intent and the intent to conceal the true state of his affairs were properly inferred from the conduct of the Insolvent, and that with a view of the amount of the punishment to be awarded Insolvent, the Insolvency Court were entitled to look at the general nature of the Insolvent's conduct and transactions, to see whether he yielded to sudden temptation, or whether he was engaged in a long course of fraudulent dealing.

APPEAL from the Adelaide Insolvent Court.

The Insolvent commenced business in January 1881, as a bark and hide merchant with a capital, after deducting his liabilities, of nearly £900. He kept a day-book, journal, cash-book, and ledger; he shewed no profit and loss account or capital account in his ledger. He never balanced his books, nor were they capable of being balanced. The cash-book seems to have been fairly kept to July 18th, 1882, although it was proved that up to that date some payments out were not recorded. From July 18th, 1882, to February 17th, 1883, the Insolvent commenced to receive the payments due to him direct from his customers and cash the cheques. He then handed portion of the cash to his bookkeeper and instructed him to

enter it to the debit side of the cash-book to "A. F. Fisher, cash," and to pay it into his banking account to meet his current cheques. He paid some of his trade accounts with the proceeds he retained, and was able to give no explanation of what he had done with the balance, except that he probably spent it. It was impossible from Insolvent's books to ascertain what Insolvent had received and spent in his business. Up to February 1883, the Insolvent was interested with one Dendy in partnership in a grazing farm at Milang, and had a number of racehorses in training. No books were forthcoming with regard to the grazing business, although Insolvent stated his partner had them, and no books were kept of the expenses of training. Up to February 1883, the Insolvent led an extravagant life, and the amount of the moneys he spent in this manner could not be arrived at. He admitted spending £1,000 in training, £1,000 in racing fees, £600 in training horses in Melbourne, £50 in gambling, £150 in other extravagances, and £1,000 to £1,500 on his private living establishment and private expenses. He could give no idea of his betting losses, except that they amounted to a pretty large amount. He also speculated in land and other matters outside his business. On February 17th, 1883, the Insolvent collected £874 from his debtors, including an item of £490 from Messrs. Stilling and Co., and an item of £220 for the sale of a bark mill and shed; he then absconded, leaving debts to the amount of over £8,500. Prior to his departure he personally entered the sums he had collected in his books, including the sum of £490, but omitted the entry of £220. In Sydney he met his partner Dendy and divided the money he absconded with, and in September 1884, he returned to the province penniless. The Insolvent was, so far as is necessary to be stated for the purpose of this case, found guilty by the Commissioner of Insolvency—1. That he did wilfully, and with intent to conceal the true state of his affairs, omit to keep proper books of account. 2. That he did wilfully, and with intent to conceal the true state of his affairs, keep his books imperfectly, carelessly, and negligently. 3. That he did, with intent to conceal the state of his affairs, withhold the item of £220, before mentioned, from his books relating to his trade dealings and estate. Any further facts neceassry for this case will sufficiently appear in the judgments.

The judgment of His Honor Mr. Commissioner Stuart was as follows:—

I find that the Insolvent commenced business in January 1881 as

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In the Matter of A. F. FISHER, AN INSOLVENT.

a hide and bark merchant with a capital in cash of £200, and having a property worth over £1,600. At this time he had debts amounting to about £1,000. With the £200 he opened an account with the Union Bank, at the same time having a banking account with the Commercial Bank. In addition to the hide business he carried on during portions of the two years ending in February 1883, the occupation of an owner of racehorses which he had trained, and he also had a grazing business at Milang in conjunction with one Dendy. The operations on his various banking accounts during two years amount to £33,000, and he appears to have been assisted in drawing this amount by the acceptances of accommodating friends—Messrs. W. Gordon & Co., £2,138; and Mr. A. M. Wooldridge, £2,000. There also appears to have been in respect of his bank overdraft at the Town and Country Bank a guarantee by Messrs. Gordon & Co. His books have been carefully examined by the accountant, who reports that they are valueless for the purpose of ascertaining the Insolvent's position and dealings. From the bank account and the statements of the Insolvent it has been ascertained that of this sum of £33,000 only some £13,000 or £14,000 was expended in the hide and bark business, the rest appearing to have gone for purchases of land, private expenses, racing, tramway shares, and the gratification of Insolvent's selfish desires. On February 17th, 1883, he absconded, leaving debts behind him amounting to some £8,000 to £10,000, and taking with him £874, which he had a few days previously collected from various sources, leaving to the unsecured creditors no assets to divide, and to the secured creditors property insufficient to cover their advances. This sum of £874 consisted of £490 advanced by Messrs. Stilling & Co. on bark shipped by the *Harbinger;* £220 realised on a sale to Messrs. Reid & Sons of his plant; and some £164 collected from other sources, viz., Messrs. Luxmoore & Co., Messrs. Wicksteed & Co., and Mr. Barnard. With this sum of £874 he found his way to Sydney, there met his partner in the grazing business—Dendy—divided the spoil, and sought for respite from his pecuniary troubles in California. There he devoted himself to speculating and losing the remnant of the £874 by investing in the Hamilton Australian Minstrel Company. After sojourning in California for about a year and nine months he returned to the province without income, and now seeks the protection of this Court, and asks to be relieved of his debts. At the time of his levanting, the creditors, in the absence of any estate, very sensibly abstained from taking proceedings for adjudication and from

involving themselves in furtherloss. Their omission to do so, however, has precluded them, on the Insolvent's return, from availing themselves either of the process of the Criminal Courts or of the powers of this Court in respect of the property made away with. The opposing creditors have, however, laid charges against the Insolvent as follows:—1. The wilful omission to keep proper books of account with intent to conceal the true state of his affairs. 2. The making of false entries in his books with the like intent. 3. Wilfully keeping his books imperfectly, carelessly, and negligently, with the like intent. 4. Withholding entries from his books with the like intent. Between January 1881, and July 1882, the insolvent, who employed a bookkeeper, appears to have furnished to the latter all necessary data to enable him to make proper entries in the cash-book and journal, and there is not very much to complain of during that period. In July 1882, his bank overdraft was about £2,500, a circumstance which of itself should have prompted him, in the interest of the bank, his guarantors, and his creditors, to be specially particular to record all his transactions and expenditure with the greatest clearness—yet we find him keeping back from his bookkeeper the particulars necessary for the books, and also when collecting amounts due to him keeping back for purposes only known to himself portions of the sums so collected. From about July 18th, 1882, the cash-book is really no cash-book at all, but only a transcript of the paid-in side of the bank pass-book. The *modus operandi* of the Insolvent was this:—On receipt of a cheque he cashed it, and handed over whatever balance was required to meet his current cheques to his bookkeeper to be passed into the bank. This transaction appears in the cash-book simply as "Cash, A. F. Fisher." One can scarcely imagine a more unbusiness-like method of dealing with the cash takings. On the face of this conduct there is a distinct presumption of want of *bonâ fides*, and of a desire to conceal the true state of his affairs. Coupled with other conduct of the Insolvent, and taking into consideration that he must have known that at this time his affairs were in a very unsatisfactory state, I can come to no other conclusion than that he wilfully omitted to keep proper books of account with intent to conceal the true state of his affairs, and that it was with the like intent that he kept a false cash-book. The other conduct to which I refer is the omission to keep any record either of his horse-racing and training transactions or of his private expenditure. As far as can be gathered he appears to have used the legitimate business of a hide merchant as a sort of milch

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cow for keeping him in the ready cash necessary for the furtherance of his horse-racing and gambling transactions, and for various other of his indulgences of an expensive and unremunerative nature. I next come to the charge of withholding entries from his books with intent to conceal the true state of his affairs. Notably under this head is the withholding of the entry of £220 received from Messrs. Reid & Sons a few days before his departure. There was clearly a design on his part to turn everything available into cash. The Court is asked to look at this omission as mere carelessness and nothing else. He did, out of his ordinary habit, with his own hand, enter the £490 received from Messrs. Stilling & Co. after the amount of £220. Why, then, did he not enter the £220? The act of entering the £490 if anything supports the charge of withholding any entry as to the £220. There was doubtless carelessness in the sense that he was quite indifferent whether in his absence the creditors could make out anything of his transactions from his books or not Such carelessness, however, partakes of the intent necessary to support the charge. It is said that the intent to conceal must be proved. It seems idle to say that it has not been proved. It is proved by the misappropriation of the £220, by the absconding, by the fraudulent partition of spoil with his *confrère* Dendy, in Sydney, and by the whole course of the Insolvent's conduct prior to his departure. He did not even inform his bookkeeper of the receipt of the £220, otherwise the entry might have appeared, and he would have been relieved from this charge. It is contended by Mr. Varley that the creditors, having lost their right, by lapse of time and by omission to have the Insolvent adjudicated in his absence, to punish the Insolvent for misappropriating the £874, are endeavoring by a side wind to punish him on the charges laid. It may be that the Insolvent's return to this country is due to a feeling of false security consequent upon the inability to punish for the graver offence. If this be so, then the Insolvent ought to have well guarded himself before his departure against the other very salutary provisions of the law relating to fraudulent insolvents. In a matter immediately relating to the money misappropriated, he has in respect of his books so acted as to deprive him of the opportunity of returning to the province and defying his creditors to punish him. Mr. Varley says there is a *locus pœnitentiæ*—that the Insolvent has under examination in Court disclosed the transaction and therefore there is no longer a concealment; that the Insolvent has till the close of his examination to make a clean breast and confess everything; that if he does so the

charge will not lie. In support Mr. Varley cited the case of *Rex* v. *Walters* (5 C. & P. 138), and in the absence of other authorities I was rather struck by the case. I find, however on research, that the case is directly over-ruled by the Court of Exchequer in *Courtiron* v. *Meunier* (15 Jurist, 275), when Pollock, C.B., speaking of *Rex* v. *Walters*, says :—"It appears to me that the language of Mr. "Justice Park cannot be supported by law. I ought to have told the "jury that no *locus pœnitentiæ* existed." On this latter authority I must hold that an Insolvent cannot withhold entries with intent to conceal his affairs and then afterwards condone his offence by making, on his examination in insolvency, confessions of his having so withheld. Were this Court to hold otherwise it would be offering a premium for false entries and fraudulent suppression in the books of an Insolvent, and it would lead to endless complications. If these charges so found against the Insolvent had been found against a trader whose misfortunes had so pressed upon his mind that he was unwilling to face his creditors, but who had left behind him such of his assets as he could save from the wreck for equal distribution, this Court might deal leniently in the way of punishment; but when the offence is aggravated by the surrounding circumstances disclosed here, it becomes the duty of this Court, for the protection of commerce and as a warning to fraudulent traders, to punish with considerable vigor. There does not appear to me in the conduct of the Insolvent to be even the shadow of a palliating circumstance. Assisted on all hands by his brothers and his friends, trusted with goods and money not his own, except for the purpose of earning a profit, in two short years he succeeds in losing his creditors' money and goods, except a sum of over £800, of which in the coolest and most heartless manner he robs them. On his behalf I am told that I am not to take those matters into consideration in dealing with the supported charges. Although unable now to deal with such as direct charges, I know of no rule which renders it the less the duty of this Court to deal with these acts of his in considering the motives of the Insolvent and the measure of punishment. The judgment of the Court is that the Insolvent be imprisoned at the suit of the trustees for a term of eighteen calendar months, and that he be awarded a second-class certificate suspended for three years, on the ground that his insolvency has not arisen from unavoidable losses and misfortune.

From this judgment the Insolvent appealed on the grounds that

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there was no evidence to warrant it, and that it was against the weight of evidence, and bad in law.

Mann, Q.C., C.S., for the Appellant.

J. H. Symon, Q.C., and *P. B. Stow* for the Respondent.

Mann, Q.C.—The learned Commissioner has allowed the Insolvent to be punished for something that he has not been proved to have done. The trustees were unable to show one instance in which the Insolvent had omitted to enter a business transaction in his books. As to the £220, which was a portion of the proceeds of the sale of a shed and mill at Hindmarsh, he received that money a day or two before he left the colony. He had no account in his books at which to enter the sum, and he had omitted to enter it owing to the suddenness of his departure. The total sum he made off with was between £800 and £900. Of course his conduct throughout was absolutely indefensible; but the particular charges of which he has been convicted were not substantiated, and the Commissioner has unconsciously allowed his mind to be influenced by the man's highly reprehensible conduct in order to discover an intent where none was shown to have existed. The book which the Commissioner called the "cash-book" was not a cash-book in the usual acceptation of the term, and every one of the Insolvent's transactions with his creditors in his business was shown in either his cask-book, journal, or ledger. The Court has to be satisfied that the man omitted the entry of £220 with the intention in his mind at the time of concealing the true state of his affairs. As the creditors would have no right to examine the books until he was declared insolvent, and as the first question they would ask would have regard to the man's property, the Insolvent could have no motive in concealing the true state of his affairs, and it was idle for the learned Commissioner to say so. The punishment awarded was excessive.

J. H. Symon, Q.C.—The Insolvent omitted to keep proper books of account with intent to conceal the true state of his affairs. He entered upon business in March, 1881, with £900 in hand. In February, 1883, he converted all his available assets into money, and left the colony with nearly £900, leaving a deficiency of £8,285. He remained absent until September, 1884, when he returned in the belief that the punishable offences would have become obliterated. He was then ready to admit everything, because he thought he was perfectly safe. His receipts and expenditure cannot be traced from his books. They show that he

never made an entry in regard to his racing studs, which involved a great loss. He had been using his creditors' money for the purpose of carrying on this outside business, and he kept no account of the transactions. The intent is clearly proved by his conduct and acts.

Mann, Q.C., in reply.

WAY, C.J.—The Insolvent was in business as a bark and hide merchant, and also in partnership with another man at Milang as a grazier, and, in addition, he had many racehorses in training. The books relating to the grazing business have disappeared entirely, and it is a significant circumstance that when the Insolvent decamped and went to Sydney he divided the sum of over £800, which he carried away, with the man with whom he had been in partnership at Milang. It is a suspicious circumstance that there should be no record whatever of the transactions in the grazing business, and that there were no books of account relating to the training of the racehorses. There was a set of books as to the bark and hide business, and the Insolvent employed an accountant. Up to July, 1882, the books were fairly well kept, but from that time the Insolvent altered the mode of keeping them. The "cash-book" ceased from that date to be a record of the cash received in the business, and afterwards recorded the moneys that were actually paid in by the Insolvent himself. These facts furnish a strong case to support the conclusion that the books were kept improperly, but when we learn that the Insolvent opened another banking account in the name of his clerk, and that that account was used for the purpose of feeding the business by means of accommodation transactions, there can be no doubt that the Commissioner was right in finding that the acts referred to were part of a scheme by the Insolvent to conceal the true state of his affairs from his creditors. What was the object of the banking business at the Port but to disguise from his creditors the actual nature of the business in which he was engaged? With respect to the charge as to the £220, I have not come to the same conclusion as the learned Commissioner. It appears to me that if I was sitting as a juryman I should have decided that the omission to enter that sum was not for the purpose of concealing the sale of the barkmill, but simply due to the hurry of the Insolvent's departure. He had nothing to conceal, as he had sold the mill and the purchaser would have been found in possession. But it is not necessary to call upon the counsel for the Respondent with respect to that matter, because I think that the other parts of the case have been made

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out, and my view on that question is not shared by one at least of my colleagues. I think the Commissioner in passing sentence was entitled to look at the nature of the acts in which the Insolvent was engaged. Of course he could not punish him for gambling, but he was necessarily compelled to review the general nature of the man's transactions to see whether this was a matter of design, whether he yielded to sudden temptation, or whether this was a long course of fraudulent dealing. I join with the Commissioner in thinking it was the latter, and therefore I consider that the term of imprisonment awarded was not excessive, and that the appeal ought to be dismissed.

BOUCAUT, J.

BOUCAUT, J.—There are substantially two sets of charges against the Insolvent—one involving the withholding of entries from his books of account under sec. 125, subdivision 2 of the Insolvent Act of 1860, and the other set involving negligence in omitting to keep proper books of account, and in keeping them imperfectly under subdivision 10. In regard to the former I rather concur with the view propounded by Mr. Mann, but it is not necessary or proper that I should dwell upon it, as I have not heard Mr. Symon in reply. In respect to the item of £220 I cannot find that it was omitted with intent to conceal, but on the spur of the moment, and in the hurry and the desire to get away. The case of *In re Joseph Rogers* (13 S.A.L.R., 160), was not nearly so strong against the Insolvent as the present case, and there the Insolvent's appeal was dismissed. The deficiency was only £900, and the man kept no books at all; but in no single respect was that case as bad against the Insolvent as the present case is, and there the Court stopped counsel. Fisher, in his examination, said:—"It is impossible to say how much I received from July, 1882, until I "went away, and the books will not show it." It was impossible to tell from the books what money came from the private business, and what did not. The whole thing was unmistakably mixed up together. I cannot say that the Commissioner was wrong in his judgment, and over and above that it appears to me that I would have come to the same conclusion if I had been in the Commissioner's place.

BUNDEY, J.

BUNDEY, J.—The argument of Mr. Mann has failed to satisfy me as to the Insolvent's conduct in omitting to enter the item of £220. It seems to me that if the argument that has been advanced by the learned counsel is correct it might lead to unfortunate consequences. Take the case of a merchant having within his premises a large stock, and assume that he wanted to do

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what the Insolvent, Fisher, has done. If he succeeded, and in a more subtle manner, there might be only the one means of reaching him. Supposing he sold his property for a large sum, and went away into another colony, then, after the expiration of four months, under subdivision 2, sec. 121 of the Insolvent Act of 1881, he could not be charged. That appears to me to produce so deplorable a result that I can hardly think it could be the intention of the Legislature. No doubt the primary motive of the Insolvent in this case was to get away. But he could hardly see that the sale of his property would at once make it manifest that he had left the place, because in the course of his ordinary transactions he was sometimes at Milang and other places. It would be only necessary for him to tide over a concealment of that kind for four months, and no punishment would be inflicted. I entirely concur with my learned colleagues in regard to the other parts of the case. I think the charges are proved, and that the sentence awarded is merited.

Appeal dismissed.

In the Supreme Court.—In Banco.

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WAY, C.J., and BOUCAUT and BUNDEY, JJ.

DURIEU *v.* WYCHERLY.

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Act No. 10 *of* 1845—*Sale of bread by weight—Prosecution, commencement of—Computation of time—Sunday—Act No.* 6 *of* 1850—*Special Case—Repeal—Act No.* 298 *of* 1883-4.

A prosecution commenced on Monday in respect of light-weight bread delivered on the preceding Saturday is within the provisions of Act No. 10 of 1845, sec. 7, which requires that any prosecution under that Act in respect to the delivery of bread under weight shall be commenced within twenty-four hours next after such delivery.

SPECIAL Case stated by Mr. Samuel Beddome, P.M., of the Adelaide Police Court.

Wycherly sold to one Hickley, on Saturday, April 11th, 1885, at about fifteen or twenty minutes past four o'clock in the afternoon,

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one loaf of bread purporting to weigh two pounds avoirdupois. Hickley took the loaf to Durieu, who weighed the bread on standard scales and found it two ounces short of two pounds weight. On Monday, April 13th, 1885, at about 4 p.m., Durieu laid an information against Wycherly for selling short-weight bread. At the hearing of the information it was objected on the part of the Defendant that the prosecution was not commenced within twenty-four hours next after the delivery of the loaf as required by Act No. 10 of 1845, sec. 7.

The P.M. decided that the intervening Sunday did not count, and fined the Defendant, but stated a case for the opinion of this Court on the objection.

W. V. Smith for Defendant—Under Act No. 10 of 1845, sec. 7, a prosecution for selling short-weight bread must be commenced within twenty-four hours of delivery of the bread; in this case the prosecution was not commenced for nearly forty-eight hours. This was owing to a Sunday intervening between the day of sale and the day when the prosecution was commenced. Sunday must be considered in such a case as this, although it does not count in law matters, because bread lost weight by evaporation. *Rawlings* v. *West Derby* (15 L.J., C.P. 70). The weight must be proved at the time of sale, not some hours after purchase. The information might have been laid on a Sunday. *Woolrych's Law Time* (89). He also referred to *Peacock* v. *Reg.* (27 L.J., C.P. 224), *Rowberry* v. *Morgan* (23 L.J., Ex. 191), *Exparte Simpkin* (29 L.J., M.C. 23), *Reg.* v. *Justices of Middlesex* (12 L.J., M.C. 59).

Mann, Q.C., C.S., and *R. Moore* for prosecution—The case is improperly stated. Act No. 6 of 1850, sec. 43, under which it is stated, has been repealed by No. 298 of 1883-4, part 3.

[By the COURT—The powers in the latter Act are cumulative.]

The test is whether granting the information was a ministerial or judicial act. We contend it was a judicial act, and could not be performed on a Sunday. *Mumford* v. *Hitchcox* (14 C.B., N.S. 369), *Doe dem Williamson* v. *Roe* (3 Dow and L., 330), *Fish* v. *Broket* (Dyer 181 B., Noy's Maxims 2, Makally's Case, 5 Coke, IX. 66 B.), *Gelen* v. *Hall* (2 Ex., N.S. 379), *The Churchwardens, &c., of Staverton* v. *The Churchwardens, &c., of Ashburton* (24 L.J., M.C. 53), *Paley on Summary Convictions* (6, *Ed.* 19). Where twenty-four hours are allowed

for doing anything Sunday does not count, consequently the information was in time. *Reg.* v. *Justices of Middlesex* (17 L.J., M.C. 111.)

Smith, in reply—Whatever a magistrate is directed to do he is bound to do, and the question whether this was a ministerial act depended on whether it was something which the Act, under which he exercised his jurisdiction, required him to do. The Act required it in this case. As forty-eight hours were allowed to elapse the proceeding was illegal and unfair to the persons against whom it was sought to obtain a conviction. The Lord's Day Act forbids the service of processes on a Sunday, but there was nothing to prevent an information being laid on that day.

Cur. ad. vult.

WAY, C.J.—This is a Special Case stated by Mr. Beddome, P.M. The Defendant was convicted of delivering light-weight bread under Act 10 of 1845, sec. 5. Sec. 7 requires that any prosecution against a baker shall be commenced within twenty-four hours next after the delivery of the bread. In this case the bread was bought on the afternoon of April 11th, and the information was laid on Monday, April 13th. If we read the Act literally the prosecution was too late. Two questions arise—first, whether a prosecution can be commenced on Sunday; and, secondly, did the Sunday count in the twenty-four hours next after the delivery of the bread? Mr. Smith has argued that although the Lord's Day Act forbade the service of process on Sundays there was nothing to prevent the information being laid on Sunday, and that the laying of the information would be the commencement of the prosecution, and he relied upon an old case cited in *Woolrych's Legal Time* (89). But in these summary proceedings, until the Magistrate actually received an information, the information was nothing. The commencement of the proceedings was when the Magistrate considered if he should grant an information. In fact many of the Statutes did not require the information to be in writing, and therefore when the information was written out and signed it was simply the expression of an intention to commence proceedings. The judicial act by the Magistrate of considering if he should grant an information could not be done on a Sunday. It is laid down that Sunday was a *dies non*, and that the award of judicial process on Sunday is void. If there were any doubt at all on this point it was removed by Statute 15 of 1849, sec. 3. Justices of the Peace were expressly authorised by that section to grant warrants

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on Sundays for indictable offences. It was the practice to do so before the Statute, but that provision was introduced to remove doubts. I have no doubt whatever that a Justice of the Peace could not consider or grant an information on Sunday, and that an information under the Summary Procedure Act could not be laid on Sunday. But that, of course, is not decisive. It does not follow that because the proceedings could not be commenced on Sunday they were in time on Monday. Therefore, we have to consider the meaning of the Legislature in requiring these proceedings to be commenced within twenty-four hours next after the delivery of the bread. There are many cases as to the construction of Statutes giving limits of time, and Mr. Smith cited several in which, where a number of days were allowed for doing an act, the Sunday was counted, although the last day. In *Maxwell on Statutes* (2nd Ed., p. 425) it is said: "Sundays are "included in computations of time, except when the time is limited to "twenty-four hours, in which case the following day is allowed," and he cites *Burns's Justice of the Peace Tit. Lord's Day* in proof. The case of *Reg.* v. *Justices of Middlesex* (17 L.J., M.C. 111), cited by Mr. Mann, really decides that where twenty-four hours are allowed for doing a thing the hours of Sunday do not count, and, therefore, in this case the information was in time. It is a rule which appears to be founded upon reason, and which the Legislature must have had in their minds when they required these informations to be laid within twenty-four hours next after the commission of the offence. The other construction would practically make Saturday a day upon which bakers would be able to sell light bread with impunity, and that fact must be a greater consideration than any apparent hardship from the weight of bread being diminished by evaporation.

BOUCAUT, J.

BOUCAUT, J.—If I were at liberty to give my own opinion, free from the weight of authority, I should unhesitatingly follow the reasoning of the cases quoted by Mr. Smith. Where the Statute said nothing at all about the Sunday, what right had this Court to insert an extra day? Why should we say that, although the Legislature mentioned twenty-four hours as the limit, we should make an exception and give forty-eight hours in which to lay the information? But the question was rendered difficult by the case quoted by Mr. Mann, *Reg.* v. *Justices of Middlesex* (17 L.J., M.C. 111). If the decision there given was that of a single Judge at *Nisi Prius*, I would not follow it, as I feel so very doubtful about the question. I can find no authority in law, so far as I can see, absolutely in support of the dictum laid down in

Maxwell on Statutes. In the case of *Reg.* v. *Justices of Middlesex* (17 L.J., M.C. 111), this point was certainly not raised, but it was assumed that there should be forty-eight hours when Sunday intervened. Before hearing Mr. Smith's argument I should have taken that to be the case, and would have decided, as Mr. Beddome has done, that the Sunday was not to be counted in this case. When I looked at the case of *Reg.* v. *Justices of Middlesex* (17 L.J., M.C. 111), I saw that it was impossible that the judgment of the Court of Queen's Bench could be supported unless the Sunday was excluded. I do not feel called upon to express a distinct difference from my learned colleagues and seek to overrule a decision of the Court of Queen's Bench merely on the ground that the case was not so fully argued before them as this case has been argued here. With great reluctance I bow to the weight of authority so expressed, and concur with my learned colleagues.

BUNDEY, J.—By Act No. 6 of 1850, ss. 1 and 2, a Justice of the Peace may, *inter alia*, take an information against any person who has committed, or who is suspected to have committed, any offence or act within the jurisdiction of such Justice, for which he is by law, upon a summary conviction, liable to be imprisoned, fined, or otherwise punished; and upon such information being laid the Justice taking the same may, if he thinks fit, either issue a summons or a warrant in the first instance. If he adopts the latter course, it is obligatory upon him to first have evidence upon oath or affirmation substantiating the matter of such information to his satisfaction. The Justice who takes the information also grants and issues the summons or warrant, as the case may be. Such an information is the groundwork of a Magistrate's jurisdiction, and for this reason both Paley and Oke say it should always be carefully prepared. The learned counsel for the Defendant (Mr. Smith) contends that under the above provisions Justices of the Peace have no discretion, but are bound to take every information for offences punishable on summary conviction that is brought to them by any sane person, either on a Sunday or any other day, and that Justices only act in a ministerial capacity in taking such information; that should a Justice refuse to take any such an information upon a Sunday a mandamus from this Court would lie to compel him to do so; that taking an information is not "process," or "awarding process," or the exercise of "judicial discretion;" that such discretion only arises when an application for a summons (or a warrant, as the case may be) is made, founded upon the

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information that has already been laid; and that the informer in this case, having allowed the whole of the intervening Sunday to elapse, and the twenty-four hours within which a prosecution is to be commenced to expire, the conviction must be quashed. With respect to the first point—viz., that Justices have no discretion, but are bound to take every information that is presented to them—I am unable to agree with the learned counsel's contention. It is clear, upon reference to the sections of the Act of 1850 before referred to that Justices have a discretion to grant or refuse a summons, or a warrant, as the case may be. And the learned counsel did not contend that they had not such power. Now the taking of the information in the presence of the Justice, and the signature thereto, is really in practice the exercise of the discretion—it is in effect the *fiat* upon which the subsequent process issues. I do not think an information is laid within the meaning of Act 6 of 1850, sec. 1, until all that has to be done to entitle the informer to a summons, or a warrant, has been done. The merely bringing a printed or written document to a Justice and leaving it with him without anything further does not make it an "information laid" any more than leaving a printed form of a writ with the Master of this Court for testing would make it (without the Master's signature and seal of the Court) "a writ," or leaving an engrossed indenture with a person would make it his "deed" until it was executed by him. If my view in this respect is correct, then the taking or signing of the information by the Justice is a "judicial act," and one by which he authorises the issue of process. I think that a Justice not only has the power to refuse, but that in certain cases it would be his duty to decline to attach his signature to or take any information. In some cases justice might actually be prejudiced by hearing an information *Reg.* v. *Ingham* (14 Q.B., Reps. 402); and although that case refers to an indictable offence, the principle is equally applicable to summary convictions. But the discretion to be so exercised is essentially a judicial discretion, which is defined by Lord Coke in *Rooke's Case* (3 Reps. 204), as follows:—"And, notwithstanding the words of the "commission give authority to the Commissioners to do according to "their discretion, yet their proceedings ought to be limited, and bound "with the rule of reason and law; for discretion is a science or under-"standing to discern between falsity and truth, between wrong "and right, between shadows and substances, between equity and "colorable glosses and pretences, and not to do according to their

"wills and private affections." A Justice must use his judicial judgment as the Police Magistrates in England, under similar circumstances, continually exercise theirs, and if necessary decline to take an information that would be meaningless, or mere waste paper, unless he intended going further, and awarding either a summons or a warrant. If he improperly refuse, or is influenced in doing so by any motives other than those that are properly judicial, the aggrieved party can obtain a mandamus from the Court to compel him to do his duty. Now, if it be a judicial, and not a ministerial act, it appears abundantly clear that it cannot, in the absence of express statutory authority, be exercised on a Sunday, for that day is not *dies juridicus*. In the case cited by Mr. Mann, viz., *The Churchwardens, &c., of Staverton* v. *The Churchwardens, &c., of Ashburton* (24 L.J., M.C., 53), the allowance by Justices of a parish boy's indentures of apprenticeship was held to be a judicial act, and it seems to me difficult to distinguish in principle the allowance of an information from the allowance of the indentures in the case just referred to. *Comyn's Digest Temps* (B. 3 and C 5). This strictness is also apparent in the case of *Winsor* v. *Reg.* (L.R., 1 Q.B., 289)—a case where a jury were unable to agree upon a verdict, and were discharged shortly before midnight on a Saturday. The Court on subsequent argument unanimously expressed the opinion that no verdict could have been taken on a Sunday, and if it had been a Court of Error would have quashed the conviction. At page 308, Cockburn, L. C.J., says:—"It is idle, I think, to contend that the taking of a verdict, the "delivering of a verdict on the part of the jury, and the receiving it "on the part of the Judge, and the recording it, which is also through "the act of the officer, the act of the Court, were not judicial acts; "and I entertain the greatest doubts whether the verdict would not "have been invalid if it had been delivered, received, and recorded on "the Sunday." And at page 317, Blackburn, J., says:—"I do not "think there can be the smallest doubt that to sit judicially on Sunday, "on any business, would be indecent and improper, and ought never "to be done if it can be helped." For the reasons before stated, and on the decision in the case of *Reg.* v. *Justices of Middlesex* (17 L.J., M.C. 111), I am of opinion that the conviction must be upheld, but I think under the circumstances it should be without costs.

Conviction affirmed, without costs.

FULL COURT
WAY, C.J., and BOUCAUT and BUNDEY, JJ.

In the Supreme Court—In Banco.

KEARNS *v.* WILSON AND OTHERS.

1885
April 28, 29, 30

Trespass to cattle—Master and servant—Seizure of cattle by servant by way of reprisal—Liability of master—Authority of Manager of Station.

The Defendant, W., the overseer and manager of a leasehold station of the Defendants, Wilson, acting, as he believed, in his employers' interests, but without any express authority from them, seized and detained certain teams of bullocks of the Plaintiff, K., as a reprisal for an alleged theft of a cow by two of the servants of the Plaintiff, K.

Held, that the Defendants, Wilson, were not liable for the action of their overseer, as he was not acting in the course of his employers' service, and had no implied authority to take such action, and that he could not have been said to have taken such steps in an emergency as were not unreasonable and outrageous for the protection of his employers' property.

ACTION by the Plaintiff, Howard Christopher Kearns, against the Defendants, Hector Wilson, Norman Wilson, and Alexander Wilson, and the Defendant, J. W. Wylie, claiming £5,000, for the value of certain bullock teams, cows, and calves, seized and taken possession of by the Defendant, J. W. Wylie, whilst travelling through the Coongie Lake Station, belonging to the Defendants, Wilson; or, in the alternative, claiming the return of the said goods and damages for their detention.

The case came on for hearing before His Honor the Chief Justice and a jury on the 3rd, 4th, and 5th days of March, 1885.

The facts were, shortly, these:—The Plaintiff was a teamster residing at Farina, and the Defendants, Hector Wilson, Norman Wilson, and Alexander Wilson were the owners of the leasehold station known as Coongie Lake Station, and the Defendant, J. W. Wylie, was manager and overseer for them. On or about March 15th, 1884, the Plaintiff and his servants were travelling with certain bullock teams, cows, and calves to Farina, through the said station to perform a contract to carry wool from Haddon to Farina. The Defendant, Wylie, knew of the contract. He seized the bullock teams, cows, and calves, and detained them from the Plaintiff, and alleged that he did so under the Impounding Act, No. 8 of 1853, for the purpose of impounding them because the Plaintiff was trespassing with them on the station.

The Plaintiff adduced evidence to show that the Defendant, Wylie, made the seizure as a reprisal for a cow belonging to the Defendants, Wilson, which he believed two of the servants of the Plaintiff had stolen and killed, and on the trial it was strongly contended that the

Defendants, Wilson, were liable for the act of their overseer done in their interests.

The Chief Justice put the following questions to the jury:—

I. Did Wylie take possession of the Plaintiff's bullocks?—
   (*a*). To distrain and impound them for damage to the run?
   (*b*). To convert them to his own use?
   (*c*). To take charge of them on the owner's behalf?
   (*d*). Because he suspected the Plaintiff's men had killed his employer's cow?

II. Was the seizure by Wylie with the authority of his employers, or in the course of his service, and for their benefit?

III. Value of bullocks and cows and calves seized.

IV. What is the Plaintiff's loss under his contract to carry wool in consequence of the seizure of his bullocks?

V. What damage has the seizure occasioned to the Plaintiff, assuming the cattle are returned to him, that is, what is a fair sum to allow for the loss of the use of the cattle and to the Plaintiff for expenses in going to receive them?

The Jury returned the following answers:—

I. (*a*). No.
   (*b*). No.
   (*c*). No.
   (*d*). Yes.

II. Yes.

III.

59 bullocks at £13	£767
4 bullocks at £10	40
2 cows and calves	20
	£827

IV. £167 10s.

V.

Estimated net earnings	£500
Depreciation and loss in waggons, plant, and stores	100
Estimated expenses of receiving delivery of teams, &c.	25
Wages and keep of men and boys from place of seizure to Farina	15
	£640

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On this finding the Chief Justice ordered judgment to be entered for the Plaintiff against the Defendant, Wylie, for £1,054 10s., including £167 10s. the Plaintiff's loss under his contract, and £100, the Plaintiff's depreciation and loss on waggons, and also ordered a verdict to be entered in favor of the Defendants, Wilson, as against the Plaintiff.

The Plaintiff appealed, seeking that the judgment against the Defendant, Wylie, might be increased by the sum of £500 profit, which the jury found the Plaintiff would have made by the employment of the bullock teams on the said contract, and that judgment might be entered against the Defendants, the Wilsons, for £1,634 10s. damages.

There was a cross appeal by the Defendant, Wylie, that the damages might be reduced to £25, the amount which the jury found it would cost the Plaintiff to obtain re-delivery of the cattle from the Defendants.

Symon, *Q.C.*, and *Nesbit* for the Plaintiff—The Defendants, Wilson, are responsible for the acts of their manager, the Defendant, Wylie. In every case where a master was held liable for his servant's unlawful actions, there was some departure on the part of the servant from the narrow construction of the scope of his employment. The Defendant, Wylie, acted in a reasonably necessary and fair exercise of his discretion while in his master's employ. The jury had to judge whether the circumstances gave Wylie the right to do this particular act in his master's interests. The fact was clear that he took the cattle in the belief that by doing so he in some way ensured his master's interests being better protected. No purpose could be served in having a "manager" at a station unless he could act as he believed the exigencies of a case demanded. It had been held in law that if a servant acts in the prosecution of his master's business and with the intention of benefiting his master and not to gratify or serve himself, then the master is responsible, though in one sense the wrong done was a wilful act on the part of the servant. An act done in the course of a man's employment might *primâ facie* look like an absolute, wanton, and unlawful act done to serve the man's purpose, as in the case of *Ward* v. *The London General Omnibus Company* (27 L.T., N.S. 761, and 28 L.T., N.S. 850), *Burns* v. *Poulsom* (L.R. 8, Common Pleas, 563), and yet his master might be responsible for it. He also cited *Six Carpenters' case* (1 Sm. Leading Ca. 8th

Ed. 143), *Winterbounce* v. *Morgan and others* (11 East, 395), *Evans* v. *Elliott* (5 A. and E., 142).

J. W. Downer, Q.C., and *Gall* for the Defendant, Wylie—The Plaintiff was entitled to only £25 damages, being the amount which the jury found would have been the cost to the Plaintiff of obtaining re-delivery of the cattle. Secondly, if he was entitled to the value of the cattle, he was not entitled to £167 10s. actual loss on contract, nor to £100 depreciation in the waggons. The Plaintiff had alleged a trespass and a conversion. Every trespass of goods did not necessarily amount to a conversion. If Wylie was guilty of a trespass in this instance he was not guilty of a conversion, and the jury had held this to be so. In the absence of that, the damages found by the jury were not proper damages. According to the decision in *Hiort* v. *Bott* (L.R. 9, Ex. 86), a conversion involved "a man doing an unauthorised act which deprived another of his property permanently for an indefinite time." Following the seizure by Wylie there was a severe drought, and if he had driven the cattle off the run, which he was entitled to do, they would have starved, instead of which he took them to the best quarters and had them taken care of, and gave the owner proper notice to remove them. He submitted that the measure of damages was the expense that the Plaintiff would actually have been put to in obtaining the bullocks if he had chosen to send for them.

Mann, Q.C., C.S., for the Defendants, Wilson—The seizure by the Defendant, Wylie, was not done with the express or implied authority of the Defendants, Wilson, nor in the course of his employment. The finding of the jury that Wylie did not seize the cattle for the purpose of impounding them, but as a sort of reprisal upon the owner for his servants having stolen some of his masters' cattle, could not stand side by side with the second finding, that the seizure by Wylie was on behalf of his employers and for their benefit. He seized them for an unlawful and not for a lawful purpose, and there could be no implied authority to a servant to commit an act which the employer himself would not have been justified in doing. The seizure of ninety-six working bullocks was an unlawful, wanton act. There was nothing in the appointment of Wylie which justified the Court in saying the Wilsons were responsible for any wrongful acts of trespass done by him in defiance of express instructions. What was there to raise the presumption that what he had done was in the course of his employment? In the

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case of *Poulton* v. *The London and South-Western Railway Co.* (L.R. 2, Q.B. 534), it was laid down that a servant must be acting within the scope of his authority, and if in so acting he committed an excess, his master might be liable. It could not be contended that Wylie did not know that he was doing wrong. If he had impounded the cattle, and there had been an excess, it was possible that the employers could have been held responsible.

[BOUCAUT, J.—You say that Wilsons, the employers, could have no justification in doing what Wylie did? They could give authority to Wylie to do a thing in the doing of which he could commit an unlawful excess, but they could give him no authority to commit an act which on the face of it the employers would not be justified in doing themselves.]

There could have been no implied authority to commit a trespass on the cattle of the Plaintiff. The point was fully illustrated in the case of *Lord Bolingbroke* v. *The Local Board of Swindon, New Town* (L.R. 9, C.P. 575). He also cited the cases of the *Bank of New South Wales* v. *Owston* (4, Appeal Cases 270-283), *Lyons* v. *Martin* (8, A. & E., 512), and *Limpus* v. *The London General Omnibus Company, Limited* (32, L.J., N.S., Ex. 34). It did not follow that every act done for the benefit of an employer was in the course of a servant's employment. Though Wylie acted from a desire to benefit or serve his masters, that would not be sufficient to render them responsible. Before he was liable the act must be something done in doing what the master employed the servant to do. The seizure of the Plaintiff's cattle was against express instructions, and he could not possibly have had any implied authority.

Symon, Q.C., in reply—Wylie acted according to the exigencies of his position in the interests of his masters. His duty was not to commit a trespass on other people's goods, but to protect his masters' herds, and if he reasonably thought that it was necessary to protect them against the two men employed by Kearns, then if he made a mistake in the manner of protecting the herds—a mistake not unreasonable and outrageous—the masters were liable, because the mistake would have been committed absolutely within the sphere of his duties. On the other hand, even if it was not so, still he was there to protect his masters' property, and this was a case of emergency owing to the destruction, as he believed, of his masters' cattle. He adopted a course that the jury were justified in thinking was not an imprudent one, and on such a ground the masters were

liable. He submitted that the questions for the jury were intended to lead to a description of the motives that actuated Wylie, and not the character of the act itself.

WAY, C.J.—This is an action brought by Mr. Kearns against Messrs. A. & N. Wilson and Mr. Wylie for the seizure of certain bullocks and cows which were the Plaintiff's property. The Defendant Wylie seized them, suspecting that a felony had been committed by two of the Plaintiff's servants. The consequence of their being so seized was that Kearns was unable to carry out a contract in which he was engaged in the carting of a quantity of wool to Farina. At the trial I was doubtful as to the law applicable to the case, and therefore I asked the opinion of the jury upon certain questions of fact which were in dispute, and also as to the measure of damages in two aspects of the case. On the answers to those questions being given by the jury I directed a judgment to be entered against Wylie, and in favor of the Defendants Wilson. Mr. Downer, acting on behalf of Wylie, did not attack the verdict, but he attacked the measure of damages. He said that this was practically an action of trespass, and that the measure of damages was the injury done to the bullocks. But, as was pointed out by Mr. Symon, and as was laid down in all the cases quoted, the measure of damages in this case was the same as in trover, it was their value or the injury done to them. In this case the bullocks were driven away some thirty miles, and about 100 miles from where the waggons were by means of which the Plaintiff was carrying out his contract. It was said on behalf of Wylie that it was the duty of the Plaintiff to have gone after them. I do not agree with that. If the Defendant Wylie wished to restore the goods which he had seized it was his duty to tender them to the Plaintiff. That not having been done the Plaintiff was deprived of his property, and the ordinary measure of damage was its value. In addition to that the jury found that he lost £167 10s. in respect of the profits under the contract, and £100 for depreciation of the drays, which were left in an inaccessible place exposed to the elements. I am of opinion that in none of these particulars ought the verdict to be reduced. Mr. Symon claims that the verdict ought to be increased by £500 as damages, the amount of profit which the Plaintiff said he would have made had he not have been deprived of his bullocks, and the jury mentioned that sum in their answer to the question. But that was in answer to the question on the assumption that the bullocks were restored to

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him. There was no reason why the Plaintiff should not have bought other bullocks for the purpose of engaging in his business. I am therefore of opinion that the damages should neither be reduced, nor on the other hand should they be increased.

Next comes the more important question, the motion on the part of the Plaintiff to render Messrs. A. & N. Wilson liable as well as their servant Wylie. The Wilsons were liable if this seizure was made by Wylie "with the authority of his "employers, or in the course of his service and for their benefit." At the trial I was of opinion that there was no evidence for the consideration of the jury in support of that contention, and I am ordinarily the Judge under those circumstances of what questions should be put to the jury. In recent times, however, it has been felt by all the Courts that a new trial is a reproach to the administration of the law, and therefore it has been my practice, following the precedents set me by eminent Judges in England, to put to the jury the questions which will enable the case to be finally decided without a second trial, whatever might be the view of the Court ultimately with respect to the law of the case. This was the course adopted by the Judges in some of the cases that have been cited in argument to-day. The practice is not novel in this country, nor novel in England. The Court have to consider whether there was in fact any evidence to be submitted to the jury in support of that particular question. If there was, the verdict that I directed in favor of the Wilsons was wrong, and it ought to be entered against them. It is not a question as to the weight of the evidence at all. It is a question as to whether there was any evidence to be submitted, because if there was any evidence on which the jury would have been justified in answering that question, I should refuse to disturb the answer which was given by the jury, however strongly my opinion might tend the other way on the question of fact. The rule as to the liability of employers for the wrongful acts of their servants was laid down in a most authoritative way by Willes, J., in the case of *Burwick* v. *English Joint Stock Bank*, *L.R.*, 2 *Ex.*, 259, in language which was adopted by the Judicial Committee of the Privy Council in the case of *Mackay* v. *Commercial Bank of New Brunswick*, *L.R.*, 5, *P.C.*, 411 *and* 412. The way this seizure of cattle had been made was disputed, and I asked the jury to say if it had been made by Wylie by way of distress, or to convert them to his own use, or to take charge of them on the owner's behalf, or be-

cause Wylie suspected that the Plaintiff's men had killed his employers' cow. They answered the first three questions negatively and the last in the affirmative. If they had answered the first in the affirmative and the last in the negative, I should have directed the judgment to have been entered against the Wilsons, and I am not prepared to say at this moment that I would be a party to direct such a verdict to be interfered with. But the jury said that the seizure was made by the Defendant Wylie, by way of reprisal in consequence of his suspecting that a criminal act had been committed. Now, here I think it necessary to pause for a moment to say that I do not agree with the contention of the learned counsel for the Plaintiff that the questions put to the jury were not intended to describe the act itself, but merely the motive by which Wylie was actuated. I am bound to say that I would not have taken up the time of the jury with such a barren investigation as was suggested. It was the character of the act itself, and not merely the motive, that I wanted described. Therefore the question resolved itself as to whether the Wilsons were liable in respect of a seizure of this character by way of punishment for a criminal act. The Defendants Wilson were only liable if they actually authorised this act of Wylie's to be done. Did they actually authorise the act to be done? Can it be assumed to be authorised by the general course of dealing between Wylie and his masters, or by some emergency that arose in consequence of the killing of a beast the carcase of which Wylie discovered on the run? The first two questions can be disposed of in a word. There is not a scintilla of evidence that either of the Defendants Wilson expressly authorised Wylie to take such action, or that the course of dealing between them implied that such an act was authorised. Then we come to consider if the emergency that arose was such as to justify Wylie in doing this, acting on his masters' behalf. The jury found that he did it for the benefit of his masters, and I do not doubt that that was the motive by which he was actuated. But the question is, if it can be deemed to have been done in the course of his masters' service. This question has been dealt with in a large number of cases, and in that of *Allen* v. *The London and South-Western Railway Company*, *L.R.*, 6 *Q.B.*, 69, a marked distinction was made between an act done for the purpose of protecting the property of the employer by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. Now, what really happened

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here? Because Wylie suspected that the Goodwins had stolen his masters' cow, he seized Kearns' property. In other words, A seized the property of B because he thought that C had committed a felony. There was no case in which liability for such conduct as that on the part of a servant had been attributed to an employer. I agree with the definition of the law as laid down by Mr. Symon in his reply. If Wylie had taken such steps for the protection of his masters' property as were not unreasonable and outrageous, in all probability the employers would have been liable. But the step which he took had no regard whatever to the protection of his employers' property; it was the seizure of a second person's property because he thought a third person had committed a crime. On a careful review of all the cases which have been called to our attention—the old cases as well as the more recent ones—I am quite satisfied that conduct of that character cannot be regarded as in the course of the employers' service, and I am therefore of opinion that the impression that I had at the trial that there was no evidence on the question to be submitted was right, and that the verdict was properly directed in favor of the Defendants Wilson. Mr. Symon also moved on the question of costs. I consider that there were two actions tried in one, practically one against Wylie and one against the Wilsons. The Wilsons have been successful, and they will get their costs against the Plaintiff. Mr. Symon contended that he ought to have a remedy for his costs against Wylie; but the answer to that appears to be that it was by no act of Wylie that the Wilsons were joined in this action. The Plaintiff must therefore take the consequences of having joined a party who was not liable.

BOUCAUT, J.

BOUCAUT, J.—I agree with the opinions expressed by my learned colleague, and also with the reasons given by him for the judgment. The facts were very simple, and my mind is very clearly made up as to the principles which were laid down. The Wilsons were sheep-farmers, and had a manager at Coongie. The Plaintiff was a carter, and had drivers assisting him in the management of the bullocks which he used. The bullocks were on Wilsons' run lawfully enough, and Wylie wrongfully, without any cover or pretence of right, seized them out of the charge of the persons in whose custody they were, and drove them away. There were many intricacies in the case which the jury had eliminated by their findings. Wylie pleaded that he took the cattle for the purpose of impounding them; but the jury found that he did so because he suspected the Plaintiff's men of having

killed one of his masters' cattle. I should be rather disposed to agree with the verdict of the jury. I place no blame at all on Wylie, who probably thought he was doing that which was necessary to protect his masters' interests. But it is perfectly clear to me that Wylie made a great mistake, and that he must suffer for it, the act being one of oppression utterly unjustifiable. It would be an exceedingly dangerous condition of affairs if a manager had an implied authority to go out and make reprisals on a third man's property for a suspected offence by a second man. With regard to the claim by Mr. Symon of £500 damages, I see no principle whatever by which that can be recovered.

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BOUCAUT, J.

BUNDEY, J.—I have nothing to add on the question of costs. I also agree on the amount of damages determined on. Although the facts are undoubtedly in a narrow compass, the action itself is a very important one. If managers of stations are sent out with full authority to conduct the business of their employers, and their employers can escape from actions of this kind great injury might be done. On the other hand, it is quite clear that they should not be held liable unless they bring themselves within the law. If a flock of sheep affected with scab came amongst a flock of clean sheep, undoubtedly the manager would be justified in destroying the diseased animals in such an emergency. But this case was of a different kind altogether, and no emergency warranting such an unlawful act as was committed could be pleaded in Wylie's defence.

BUNDEY, J.

Plaintiff's motion dismissed with costs to Defendants Wilson. The Defendant Wylie's motion dismissed with costs.

WAY, C.J., and BUNDEY, J.

In the Supreme Court.—In Banco.

1885
July 21.

In re ESSELBACH.

Will—Executors and Trustees—Codicil—Revocation of Appointment of Trustees, but not of Executors—Renunciation of Probate by surviving Executor—Executor according to tenor.

E. made his will and appointed V. and S. trustees and executors. E. made a codicil revoking appointment of V. and S. as trustees, and appointing U. and R. in their stead, but did not revoke their appointment as executors. S. and U. predeceased the testator. V. renounced probate.

Held, that probate could be granted to R. as executor according to the tenor of the will.

GUSTAV LOUIS ESSELBACH by his will dated June 22nd, 1868, appointed Christian Schilling and Herman Ludwig Vosz, trustees and executors of his will, and devised to them all his real and personal estate upon trust for sale and conversion. By a codicil dated January 18th, 1873, Esselbach revoked the appointment of Schilling and Vosz as trustees of his will, and appointed Heinrich Christian Uhlmann and Christian Heinrich Ronde trustees thereof. The testator died on June 2nd, 1885, Schilling having predeceased him on July 24th, 1883, and Uhlmann having also predeceased him on May 24th, 1885. On June 6th, 1885, Vosz renounced probate.

Fleming applied that probate might be granted to Ronde as executor, according to the tenor of the will. *Wms. Exs.* (7 Ed. 244, 248); *Lynch* v. *Bellow and Anor.* (3 Phill, 424); *re Collet* (1 Deane's Eccles. Reps., 274); *Grant* v. *Leslie* (3 Phill, 116).

WAY, C.J. WAY, C. J.—The testator by his will devised his real estate to trustees upon trust for sale, and appointed the trustees executors of such will; subsequently he revoked the appointment of trustees but not of executors, and appointed other persons trustees in their place. The intention of the testator was, no doubt, to revoke the appointment of executors made by his will, and under the circumstances which have happened the persons named in the codicil as trustees would be executors according to the tenor of the will. Probate will therefore be granted to the surviving trustee named in the codicil.

BUNDEY, J. BUNDEY, J.—I have no doubt that the intention of the testator was to appoint executors as well as trustees by the codicil. I concur in the judgment.

In the Supreme Court.—In Banco.

WAY, C.J., and BUNDEY, J.

Re BADGER.

1885 *July* 21.

Practitioners of the Supreme Court—Admission—General Rules and Orders of the Supreme Court, Part iii. *Rule* 14.

A clerk who has served the full term of his articles, and has passed the necessary examinations for admission as a Law Agent in Scotland prior to, but was not admitted until some time after leaving that country, may be admitted as a Practitioner of the Supreme Court of South Australia after residing for one year in South Australia since passing the examination.

Symon, Q.C., applied that Magnus Badger, who had been articled in Scotland and had passed the necessary examinations there for admission as a Law Agent, but prior to his admission there had left Scotland, might be admitted as a Practitioner of the Supreme Court, having since his residence in South Australia been admitted in Scotland. The Applicant had resided for one year continuously in South Australia partly prior to and partly since his admission. The question for the Court was whether the year's residence in South Australia, required by Rule 14 Part 3 of the General Rules and Orders of the Supreme Court, was to be after the date of admission in Scotland, or whether a year's residence in South Australia, after having passed the necessary examinations elsewhere than in South Australia, was sufficient to entitle a person to admission as a Practitioner.

R. Moore for the Board of Examiners.

The Court held that a year's residence in South Australia, after having passed the necessary examinations elsewhere, was a sufficient compliance with the rule, and ordered that the Applicant might be admitted, although a year had not elapsed since his admission in Scotland.

FULL COURT
WAY, C.J., and BOUCAUT and BUNDEY, JJ.

In the Supreme Court.—In Banco.

WASLEY *v.* WASLEY AND McCULLAGH.

1885
August 18.

Dissolution of Marriage—Irregular issue of Subpœna to Respondent—Admissibility of Evidence of Identification by Witnesses from having seen Respondent in Court.

Action for Dissolution of Marriage.—The respondent and co-respondent did not appear. The order for the trial directed the evidence to be taken by affidavit, with liberty for the Judge to call for oral evidence. The hearing was adjourned to enable petitioner to give further evidence of the identity of the respondent. In the meantime the petitioner's solicitor acting *bonâ-fide* issued and served a subpœna *ad testificandum* on the respondent to compel her attendance at Court on the adjourned hearing, to enable the witnesses to identify her. She attended at the adjourned hearing for the purpose of identification, and the Judge pointed out the irregular use to which the subpœna had been put. The petitioner's solicitor then proposed to call the respondent, and ask her if she was the person served with the subpœna. The learned Judge declined to permit him. The petitioner's counsel then tendered the evidence of two witnesses, who proved the identification of the respondent from having seen her in Court. The learned Judge received the evidence, subject to the opinion of the Full Court, as to whether it was, under the circumstances, admissible.

***Held*, that the subpœna was irregularly issued, and that it was the function of the learned presiding Judge to have called attention to the irregularity, but that as the respondent had voluntarily appeared, not under any promise or threat, the evidence of the witnesses proving her identity from having seen her in Court in compliance with the subpœna, was properly admissible.**

Per BOUCAUT, J.:—That in similar cases he would decline to accept such evidence, even if the petitioner's solicitor should have acted *bonâ-fide* in issuing the subpœna.

THIS was a petition for dissolution of marriage by Josiah Wasley against his wife, Anna Wasley, on the grounds of adultery with the co-respondent, James McCullagh. The respondent and co-respondent did not appear. On March 24th, 1885, an order was obtained by the petitioner for the cause to be tried upon affidavit before a Judge without the intervention of a jury, with liberty for the Judge to call for oral evidence and with liberty also for the respondent to require evidence to be taken orally if application be made within a month. The cause came on for hearing on May 21st, 1885, before His Honor Mr. Justice Boucaut, but there was not sufficient evidence of the identification of the respondent. The case was accordingly adjourned, and the adjourned hearing came on before the same Judge on August 14th, 1885. In the meantime the petitioner's solicitor, acting *bonâ-fide*, had issued and served a subpœna on the respondent to compel her attendance at the adjourned trial, for the purpose of enabling two of his witnesses to identify her. On the adjourned hearing the petitioner's counsel proposed to call two witnesses, who he stated could complete the chain

of proof. But the learned Judge pointed out that in order to do this he had improperly subpœned the respondent. The petitioner's counsel then proposed to call the respondent, and to ask her if she was the person served with the citation, but the learned presiding Judge declined to permit the question as tending to show that the respondent had been guilty of adultery. The petitioner's counsel then tendered the evidence of two witnesses, who were able to identify the respondent from having seen her in Court in attendance on the subpœna, and the Judge decided to take the evidence subject to the opinion of the Full Court as to its admissibility under the circumstances.

B. A. Moulden for the petitioner, asked His Honor Mr. Justice Boucaut to report the allegations in the petition proved.

BOUCAUT, J.

BOUCAUT, J., said the case was a peculiar one. There were several peculiarities about it, as well as difficulties, and there appeared to be one irregularity, but he had no doubt that Mr. Moulden would be able, if called upon, to grapple with them, for he had mentioned them to him the previous day. No appearance in the suit had been entered by the respondent or co-respondent. The order giving directions as to mode of trial was obtained on March 24th, 1885, and ordered that the cause should be tried upon affidavit before a judge without the intervention of a jury, with liberty for the judge to call for oral evidence, and with liberty also for the respondent to require evidence to be taken orally if application made within one month, and the first hearing came before him on May 21st on affidavit under the order, but there was not sufficient evidence of the identificaion of the respondent. It was shown that there was a woman of a certain name living in a house with the co-respondent, but it was not shown that the woman was the wife of the petitioner. There was a strong responsibility thrown on the Court of having the clearest evidence that the person living in adultery was really the person the petitioner alleged her to be. The remarks of Lord Stowell in *Seule* v. *Price*, (2, Hag. Con. C. 192), were explicit on this point. He accordingly adjourned the suit for more conclusive evidence, and on August 14th, when the suit came up again, Mr. Moulden said he had two witnesses who could complete the chain of proof. In order to do this, the learned counsel had subpœnaed the respondent, who was present in court for the purpose of identification. This was clearly confrontation of the respondent. It appeared to him that the subpœna had been put to an irregular use. It was bringing the respondent into court on a subpœna *ad testificandum*, ostensibly with a

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view of causing her to give evidence, but really to use her presence in court for a different purpose. She was brought there for the purposes of confrontation and to enable the witnesses to identify her. He pointed this out to Mr. Moulden, who, however, thought he had a perfect right to bring the respondent into court. He was certain that in doing this Mr. Moulden was acting perfectly *bonâ-fide*. Had he thought otherwise he should have taken upon himself the responsibility of stopping the case. Mr. Moulden then proposed to cure this defect by calling the respondent to ask her if she was the person served with the citation. He, however, thought that course was open to objection, as it would not cure the colorable issue of the subpœna, and because it would tend to show that she had committed adultery, and would be a contravention of the Evidence Further Amendment Act, 1869, and in deference to his remarks Mr. Moulden did not call her. Mr. Moulden then tendered the oral evidence of the two witnesses, but he thought under the order Mr. Moulden had no right to call oral evidence. Mr. Moulden then pressed him to take the evidence, and he allowed it to be taken, but it seemed to him to be doubtful if he could legally receive it under the circumstances. As the learned counsel had, however, acted in good faith, he told him that subject to the objections he had mentioned in regard to the acceptation of evidence, he would report the allegations proved to the Full Court. His Honor stated that in this colony there were many respondents who did not appear, and he had had before now to send several cases back for better proof of identification. Some members of the bar had been very remiss in this respect, and such a course naturally increased expense—a thing His Honor wished to curtail. The points upon which he desired the opinion of his learned colleagues were:—1. Was the subpœna properly issued to bring the respondent to court? 2. Was the evidence properly received under the subpœna? 3. Could the objection be cured by asking the respondent the question proposed? 4. Was it competent for Mr. Moulden to tender *viva voce* evidence, and was it proper for the Judge under the circumstances to assist him by receiving it?

[WAY, C.J., referred to the case of *Hook* v. *Hook*, 28, L.J.P. and M. 29.]

Moulden.—1. The subpœna was correctly issued for the purposes for which it was used. If incorrect, it was competent for the respondent to take objection, and if not rightly subpœnaed she should not have attended. Having come, she has not chosen to act upon her

rights. If he had called the respondent without the issue of the subpœna, it would have laid him open to the suggestion of collusion having taken place. 2. The question he proposed to ask respondent did not tend to prove her adultery. Evidence Further Amendment Act, 1869, s. 3—*Harris* v. *Harris* (31, L.J.P. and M. 160).

[WAY, C.J.—Evidence of adultery by either party is absolutely forbidden to be given by the Matrimonial Causes Act, 1867, s. 57, and this rule is clearly expressed by the Evidence Further Amendment Act, 1869, s. 3.]

He would have been entitled to ask the respondent where she was living. If the question itself was not directed to any of the circumstances of an act of adultery, it was not prohibited, because it might possibly in a remote manner assist in the proof of adultery.

WAY, C.J.

WAY, C.J., said that this case was ordered to be tried before his learned colleague Mr. Justice Boucaut, upon affidavit, without the intervention of a jury, and with liberty to the judge to call for oral evidence if he considered it necessary. There was one point raised upon the argument which it was unnecessary he should pronounce any opinion on, and that was the speculative question of whether the wife could have been asked where she resided. She had not been asked that question, so he did not consider there was any necessity for him to deal with it. The real points they had to consider were: first, was the subpœna regularly issued? secondly, if not, was the judge who tried the case exercising his proper functions in calling attention to the irregular issuing of such subpœna? and lastly, assuming there had been an irregularity in the issuing of the subpœna, was the evidence taken properly receivable? Now, as to the question of whether the subpœna was regularly issued or not, the answer to that appeared to him to be an exceedingly simple one; the case was ordered to be tried on affidavit with liberty for the judge to call for oral evidence. There had been no order by the judge that oral evidence should be given. Again, the object with which the subpœna was issued was not for the purpose of taking the evidence of the respondent, but to bring her into Court for the purpose of confrontation. It appeared to him abundantly clear that the issuing of the subpœna was altogether illegal and unwarranted. The object of the subpœna *ad testificandum* was to bring some one before the Court to give evidence, and it could only be issued under a proper power to compel the attendance of witnesses to give evidence if required. The cause was directed to be tried on affidavit, and, as he said

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before, there had been no order by the learned judge that oral evidence should be given, and therefore, as there was no power to call for the evidence, the issuing of the subpœna under these circumstances was an altogether unwarranted act. But it was said that a subpœna might be issued for the purpose of bringing the respondent into Court, not to give evidence but for the purpose of being identified, but the name of the writ of subpœna, as he had before mentioned, was an answer to that argument. When they bore in mind that the Court itself had no power in this case to order a party to come before it for the purpose of confrontation, most certainly an order of that kind would not be made indirectly by a writ issued of course without any application to the Court at all. It therefore appeared to him that on these grounds it was an irregularity to issue the subpœna. In saying this he desired to exculpate Mr. Moulden from the commission of any intentional irregularity. He was sure that Mr. Moulden had no desire to take any unfair advantage of the Court, but was simply anxious to avoid any appearance of collusion. The learned counsel said that assuming the subpœna to be irregularly issued no one could take exception to it but the wife herself. He took exception to that view, for this Court was the guardian of its own process, and it was its duty to see that such process was not abused, and that something was not attempted to be done which the Court had no power to order to be done thereunder. The subpœna having been issued irregularly, the Court itself was bound to take notice of that irregularity. It was all the more important that the Court should be vigilant in preventing abuses of its process, in order that people might not be placed in the false position of having to assert their rights at the risk of being guilty of contempt of Court. Unless the Court restrained irregularities of this kind they would have witnesses refusing to attend upon their subpœna, and they would not be able, as at present, to depend upon practitioners who were officers of the Court, acting upon its rules. So much then for the preliminary question. The next question that arose was, did this irregularity render it necessary to reject the evidence given. It appeared to him that in consequence of this subpœna the respondent attended in Court, and in consequence of her presence the witness who proved the fact of her marriage, and the other who proved her adultery were able to say that they were both speaking of the same woman, and to identify her. He understood the rule of law to be that where a witness was

induced to give evidence in consequence of a promise or of a threat, such evidence was of no avail. But the respondent was not in this position, and was not called to give evidence. Although the subpœna was issued irregularly (and had this been done intentionally it would have been a contempt of Court) there was nothing in the rules of Court to render inadmissible the evidence of the witnesses who saw the respondent in Court in consequence of her attending upon such subpœna. Therefore, he was of opinion that their evidence was admissible. Furthermore, supposing this petition were dismissed, and a fresh petition filed, and the same two witnesses gave evidence as to the identity of the woman, it would be impossible to obliterate from their memory the knowledge that they had already obtained respecting her. Therefore, the evidence being admissible, the next question was whether it was properly received. He quite agreed that evidence could not be called under the order by either of the parties, but it was called by leave of the judge, who, however, expressly reserved the question for the consideration of the Full Court, of whether the evidence should be rejected as improperly receivable. It appeared to him that it was properly received. The learned judge had power to receive it, and no good purpose would have been served by its rejection. It had been shown to the satisfaction of the learned judge who tried the case that the subpœna had been issued not with any intention of committing an irregularity, but under the mistaken idea that it was the best means of advancing the ends of justice. He was of opinion—firstly, that the subpœna was irregularly issued; secondly, that it was the function of the learned judge to call attention to the irregularity; and thirdly, that the evidence objected to was admissible for the purpose of proving the identity of the respondent. The decree *nisi* would therefore be granted.

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BOUCAUT, J., said he had little to add except that he desired that the Bar might know why he brought these points before his learned colleagues. Feeling, as he had before said, that Mr. Moulden was acting *bonâ-fide*, he was anxious to assist him, and consequently did not like the idea of ordering a further adjournment, and therefore he consented to receive the evidence tendered, although he then had a doubt as to his power to do so. He was now satisfied he had power to take the evidence. However, on another occasion, under similar circumstances, he should not take the evidence at all, even were he satisfied that counsel had acted *bonâ-fide*. Though Mr. Moulden had acted *bonâ-fide*, still the irregularity was a gross one, and he desired his remarks to be mentioned in order that some of the members of

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the Bar, who had been careless and neglectful in these matters, might observe that a duty was thrown upon the Court to see that its processes were strictly carried out. He must complain of a disposition on the part of some of the junior members of the Bar to be careless in the carrying out of these processes, but he said they would have to be more carefully executed in the future.

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BUNDEY, J., said that after the exhaustive judgment which had just been given by the learned Chief Justice, he had little to add. He had only to say that when his learned colleague, Mr. Justice Boucaut, consulted him in regard to the proposal of Mr. Moulden to ask the respondent, "Were you served with a citation?" he had told him that he was of opinion that he would be in error in receiving this evidence. He referred to *Browne on Divorce* (1880, Ed.). He did not wish to add anything to the remarks which had been made by the learned Chief Justice in reference to the subpœna. Possibly no subpœna would be issued again under similar circumstances, and as the attention of the Bar had been called to the matter he did not think such a mistake would be likely to occur again. It might be said that difficulties would arise as to identification. Well he did not agree with the learned counsel when he said he could not have proved his case without calling the respondent. It would have been just as easy for the husband to have gone out with a witness, and having seen the respondent pointed her out to the witness and said, "There is my wife; is that the woman you saw living with the co-respondent?" Both the husband and the witness could have then given evidence. The learned counsel said he could not have forced the witness to have gone with the husband for that purpose, but that was practically a mere question of pecuniary arrangement in most cases. It seemed to him that Clause 3 of Act 10, of 1869-70, was intended on behalf of persons charged with adultery, to enable them to confute the charge and defend their character in the witness box. No counsel had a right to ask a witness to go into the box and answer any question that might tend to show that such witness had committed adultery. The question here proposed to be asked of the respondent supplied the exact link required, and nothing could tend to prove more strongly the act of adultery. After what had been said he agreed that his learned colleague, Mr. Justice Boucaut, had the discretion to receive this evidence; he had exercised this discretion, and he was not going to disagree with him for doing so.

Decree nisi granted.

In the Supreme Court.—In Banco.

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August 18.

Licensed Victuallers Act, 191, *of* 1880, *s.* 96—*Bonâ fide Lodger—Language of Acts Act*, 9, *of* 1872, *s.* 31—*Grant and Issue of Licence—Publication in Gazette—Burthen of Proof—Evidence—Costs.*

By s. 96 of Licensed Victuallers Act, 1880 (43 & 44, Vict., No. 191), "Any person holding a publican's licence," who "shall on any Sunday sell or supply to any person not being a *bonâ-fide* lodger, living or staying in his licensed house during the day and night, any liquor or refreshment whatsoever, except between the hours of one and three in the afternoon, he shall on conviction for any such offence forfeit and pay a fine of not less than Five Pounds, nor more than Fifty Pounds."

R. was convicted at the Police Court, Adelaide, on an information under this sec., charging him with unlawfully supplying liquor to one Frederick Harvie Linklater at the hour of half-past seven o'clock on Sunday, June 14th, 1885, he not being "a *bonâ-fide* traveller or lodger." R. appealed against the conviction on the grounds that—(1) The information was vague and uncertain; (2) there was no evidence of the Defendant (Appellant) being the holder of a publican's licence; (3) that the *Gazette* referred to in the evidence was inadmissible as evidence; (4) that there was no evidence that the person served was not a *bonâ-fide* lodger, and that the *onus probandi* was on the Prosecutor (Respondent).

Held, by Way, C.J., and Boucaut, J.—Bundey, J., dissenting—that the conviction must be quashed on the grounds that the information did not disclose any offence, that the evidence adduced in the Police Court was insufficient to support a conviction, and that the *onus probandi* was on the Prosecutor.

SPECIAL Case stated by S. Beddome, P.M. of the Adelaide Police Court.

The facts were as follows:—J. LeM. F. Roberts was convicted in the Adelaide Police Court, under s. 96 of the Licensed Victuallers Act, 1880, for supplying liquor during prohibited hours on Sunday, June 14th, 1885, to a person who was not a *bonâ-fide* traveller or lodger. It was proved in the Police Court that at the annual meeting of the Licensing Bench held in the month of March, 1885, a licence was granted to the Defendant for the Prince Alfred Hotel, King William-street, Adelaide, as appeared by a notice in the *Government Gazette*, 1885, vol. 1, 1055, but it was not shewn that such licence was actually issued; that on Sunday, June 14th, 1885, at 7.30 p.m., two police-constables visited the bar of the Defendant's hotel, and found the Defendant and two other men present; that one of the men lived in Gilles-street east, Adelaide, and was drinking something which looked like Irish whisky; that one of the constables asked what the man was drinking, and whether he was a *bonâ-fide* traveller or lodger, but the Defendant refused to give any information. The police-constables admitted that they did not know

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whether the man was a lodger that night or the night before. It was contended in the Police Court on the part of the Defendant—1. That the information was vague and uncertain. 2. That there was no evidence of the Defendant being the holder of a publican's licence. 3. That the *Gazette* referred to in the evidence was inadmissible as evidence. 4. That there was no evidence that the person served was not a *bonâ-fide* lodger, and that the *onus probandi* was on the Prosecutor.

The Police Magistrate convicted the Defendant and stated a case for the opinion of the Supreme Court on the points taken on behalf of the Defendant.

Wadey for the Defendant—The third point must be fatal to the Prosecutor. There was no evidence that the Defendant was the holder of a publican's licence. The *Gazette* put in only contained the list of those persons to whom licences were granted at the March sitting of the Licensing Bench. The *Gazette* containing notice of the issue of the licence should have been put in, and he would not then have had any case.

Wigley for the Prosecutor—The Licensed Victuallers Act, s. 59, directs publication in the *Gazette* of all applications made to the Licensing Bench, and the manner in which applications are disposed of within two months after each annual and quarterly meeting. The Language of Acts Act, No. 9, of 1872, s. 31, makes the *Gazette* evidence. The Court will presume that the licence has been issued.

Wadey—That the person served was a traveller within the meaning of s. 97 cannot be contended, but there was an utter absence on the part of the Prosecutor of any evidence to show that he was not a *bonâ-fide* lodger under s. 96.

[WAY, C.J.—I think the onus of proving that the person served was a lodger lies on you.]

The burden of proof is on the Prosecutor. *Copley* v. *Burton* (L.R. 5, C.P, 489), *Taylor* v. *Humphries* (34 L.J., Mag. Cas. 1).

[BUNDEY, J.—This point has been settled in South Australia. Suppose there were a hundred citizens in a hotel, would they be presumed to be lodgers? *Murphy* v. *Innes* (11 S.A.L.R., 56) affects the question. He referred to *Stacey* v. *Milne*, Mag. Guide, 474.]

The Court cannot draw a presumption to this effect.

[WAY, C.J.—The difficulty as to presumption is this: Does the presumption arise that a man who resides at the Burra and is found drinking in a hotel in town during prohibited hours is a *bonâ-fide* lodger. The Prosecutor might have called a servant in the hotel to show whether the person drinking was a lodger or not.]

Wigley for the Prosecutor—There was sufficient evidence to show that the person was not a lodger. It was proved that he resided in Adelaide. If it be necessary to call evidence from the hotel to prove that the Defendant was not a lodger the Act would become a dead letter. The Court will presume a person who lives in the same town as that in which a hotel is situated is not a lodger.

[BOUCAUT, J.—You first ask us to draw the presumption that the licence is issued when it is not, and then to presume that a man is not a lodger when he is—that is, first to presume that the publican is acting lawfully, and then that he is not.]

It is not for this Court but for the Court below to say what is sufficient evidence.

Cur ad vult.

October 16.
BUNDEY, J.

BUNDEY, J.—In this case I regret to have to differ from my learned colleagues. The Police Magistrate, Mr. Beddome, convicted the Appellant under The Licensed Victuallers Act, 1880, s. 96 for supplying refreshment to a person during prohibited hours on a Sunday, such person not being a *bonâ-fide* traveller or lodger. Against this conviction the appeal comes before us by way of Special Case on several grounds, viz.:—1. That the information was vague and uncertain. 2. That there was no evidence of the Appellant being the holder of a publican's licence. 3. That the *Gazette* put in was not evidence. 4. That there was no evidence that Mr. Frederick Harvie Linklater was not a *bonâ-fide* lodger, and that the *onus probandi* was on the Prosecutor. The first of these points was abandoned upon the argument. Those pressed upon our attention by Mr. Wadey, counsel for the Appellant, were the second and the fourth. With respect to the second, viz:—That there was no evidence showing that the Appellant was the holder of a publican's licence. The learned counsel (Mr. Wadey), contended that the *Gazette* put in by the Respondent did not show that any licence had been "issued" to the Appellant. It purported to specify the names of those to whom licences had been granted and refused, and amongst the former the Appellant's name appears, but it was argued that admitting this *Gazette* to be evidence of the "granting" of the licence,

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still it did not carry the case far enough for a conviction. In order to find the Appellant guilty, the Court below ought to have had evidence of the "issue" as well as of the "granting" of the licence. *Gazette* notices of licences, permits, or certificates having been issued, transferred, or forfeited, are made *prima facie* evidence in all judicial proceedings of the matters mentioned in such notice by clause 136 of the Licensed Victuallers Act, and had the *Gazette* with this notice of the issue of the licence to the Appellant appearing in it, been put in, that would have been *prima facie* proof of the licence having been "issued" to him; as this was not done, there was no proof of his being a licensed victualler, and therefore, the case failed against him. The point is well put, and remembering this is a Penal Statute and the strictness of construction of such Statutes, I have not come to an opinion adverse to the Appellant's contention without hesitation. On the whole, however, I think the argument is not tenable. I think there was evidence upon which the Court below were justified in holding that the Appellant was a licensed victualler upon the following grounds: The *Gazette* put in proved the granting of the licence in March, 1885; the alleged offence occurred upon June 14th, 1885, nearly three months afterwards. By The Licensed Victuallers Act, 1880, s. 44, if the money for the licence is not at once paid the party to whom it is granted is to be deemed unlicensed, and if not paid within two months after the licensing meeting the grant of the licence is rendered void and no licence can be issued. The witnesses called proved the business of a hotelkeeper was being carried on by the Appellant upon the premises for which the licence was so granted, and the Defendant called no rebutting evidence. In summary conviction cases a good test of whether there is any evidence to warrant a conviction is: "Would a Judge sitting at *Nisi Prius* have "nonsuited on facts of relative strength to those disclosed." See the remarks of Blackburn, J., in *R.* v. *Ternan* (33 L.J., M.C. 216). In this case I do not think he would have done so. He would have told the jury they were entitled to assume that the licence proved to have been granted to the Appellant, who was found three months afterwards upon the premises therein specified carrying on business therein authorised to be carried on, had been duly issued to him. Doubtless, stronger evidence might have been given, but what we have to determine is whether the circumstances to which I have already called attention (coupled with the testimony of the witnesses presently alluded to when dealing with the remaining point) disclose any evidence upon

which it was competent for the Court below to convict. With its weight or credibility we have nothing to do, that is entirely a question for the convicting Justice. I cannot say there was not some evidence from which the Court below could fairly infer a *prima facie* case so far as the first point is concerned. I will now deal with the remaining point, viz.: That the conviction cannot be upheld, because there was no evidence that Mr. Linklater was not a *bonâ-fide* traveller or a *bonâ-fide* lodger. It is unfortunate that The Licensed Victuallers Act of 1880 does not follow the Imperial Statute by creating the offence in one clause and inserting the ground of defence in another, or at any rate in a subsection, when the question of the onus of proof in similar cases could scarcely arise, for according to all rules of pleading such a defence would then have to be pleaded and proved by the Defendant, per Blackburn, J., in *Roberts* v. *Humphreys* (L.R. 8, Q.B. 489). But it is otherwise when the exception is contained, as it is in The Licensed Victuallers Act of 1880, in the clause containing the prohibition, for then the burthen of proving that the prohibition has been infringed and that the case is not within the exception is cast upon the informer: *Gill* v. *Scrivens* (7 Term R. 27), *R.* v. *Pratten* (6 Term Reports, 559), *Taylor* v. *Humphries* (34, L.J., M.C., 3, per Earl, C.J.). The Imperial Act also contains the following provision, which likewise is absent from the South Australian Act of 1880: "Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in this Act may be proved by the Defendant, but need not be specified or negatived in the information, and if so specified or negatived no proof in relation to the matters so specified or negatived shall be required on the part of the informant or complainant." In the case of *Roberts* v. *Humphries* (L.R. 8, Q.B. 488), before cited, decided since the Imperial Act was passed, Mr. Justice Blackburn referring to the case of *Copley* v. *Burton* (L.R. 5, C.P. 489), cited by Mr. Wadey, and the other cases (brought under the attention of this Court on a similar point in *Murphy* v. *Innes* (11, S.A.L.R. 57) in the following terms: "We need not enquire in the present case whether these 'cases were or were not rightly decided. The decisions no doubt put "great difficulty in the way of enforcing the Act, and enabled the "persons licensed to keep open their houses with impunity during the "prohibited hours." From these observations it is evident the learned Judge did not entirely approve of such decisions, and the late Mr.

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Justice Stow in giving judgment of this Court in the above cited case of *Murphy* v. *Innes*, a decision under the repealed Act of 1872, says: "The motive in selling is not involved in the last Legislation as it was "previously. If a man sell now to a person who is not a traveller it "appears to me that he is liable, no matter what his belief was as to his "*bonâ-fides*." Since this decision the Legislature inserted the following proviso to the 96th clause of the Act of 1880 (the clause under which the information was laid in this case), viz.: "Provided that "such person holding a publican's or wine licence shall not be liable "for the aforesaid penalties if it can be shown to the satisfaction of the "Court, who shall hear the case, that the person holding such licence "was imposed upon by the person who had been admitted to such "house as a *bonâ-fide* traveller by false representations." Without proof of any such false representations the judgment in *Murphy* v. *Innes*—still as it seems to me—applies. If a publican during the prohibited hours serves a resident in the city without taking the trouble to enquire whether the person so served is a traveller or not, and it is proved such person is not a *bonâ-fide* traveller, the publican is liable, and as he alone can establish the fact if he has been imposed upon, the onus of proving this is on the licensed victualler. The definition of a traveller in the Act of 1880, s. 97, is as follows: "No person shall be deemed a *bonâ-fide* traveller, "within the meaning of this Act, unless he shall reside at least "five miles from the licensed premises where he shall be supplied "with liquor or refreshment, and shall have travelled at least "that distance on the day when he shall be so supplied." The prosecution in this case proved that Mr. Linklater resided in Gilles-street, in this city. This was not contradicted, and Mr. Wadey did not seriously contend that this was not sufficient to show he was not a traveller. He rested his argument on the other point of the clause, viz.: "That there was no evidence that he was not a *bonâ-fide* lodger." I think there was ample evidence that Mr. Linklater was not a traveller. Then was there *primâ facie* evidence of his not being a lodger. The Police Magistrate had before him the evidence of two witnesses as follows: "At 7.30 p.m. went into the bar. Met three "men coming out. The Defendant was present. Two men were "standing at the counter, and Mr. Linklater was one. He lives in "Gilles-street east. He was drinking something out of a nobbler-glass. "It looked like Irish whisky. Mr. Linklater drank up what was in "the glass, put it on the counter, and covered it with his hands. I

"said to Defendant, 'Is this man a *bonâ-fide* traveller or lodger?' "Defendant said, 'I shan't tell you, you have no right to ask me that "question. You did not see him drink anything.' I tried to get the "glass. The Defendant picked it up and smelt it, and put it under the "counter." In cross-examination both witnesses said they did not know whether Mr. Linklater was a lodger at the house that night or not. No evidence was called for the defence. In deciding a case of this description it is necessary to bear in mind that where the subject matter of the allegation lies peculiarly within the knowledge of one of the parties that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favor *Dickson* v. *Evans* (6, T.R. 60). It was easy enough to prove Mr. Linklater was not a traveller, but the knowledge as to whether he was or was not a lodger at the hotel was not and could not be accepted in the minds of the witnesses for the prosecution. It was essentially in that of the Defendant, and what was his conduct under the circumstances? The inference (if any) capable of being drawn from such conduct is entirely for the Court below. The following cases will serve to show upon what evidence of circumstances and acts of the accused Magistrates have been held justified in convicting: In *Seagar* v. *White* (48 J.P., 436 S.), a wife was licensed to sell liquors, and her husband told the constable that he took some spirits away to B.'s house, where they were raffled for and then consumed. He brought back the proceeds and put the money in S.'s room, and she duly received it. The Justices having convicted S. of selling at B.'s house, not being licensed to do so; the Court held that as S. being a competent witness (as Defendant is here) did not contradict the husband's account, there was some evidence to support the conviction. In *Stacey* v. *Milne* (39 J.P., 103), it was proved that residents in a town were served on a Sunday, but there was no evidence that the landlord knew any of them, and he swore he *bonâ-fide* believed them to be all travellers; conviction upheld. In *Jenkin* v. *King* (L.R. 7, Q.B. 478), two men were walking on the highway. They had a lurcher with them, and one was carrying a net under his arm, similar to those used for snaring hares. It was a wet day. The only evidence adduced was that the policeman heard the yelping of a dog. He found the net in one of the men's possession wet, which might have been caused by endeavoring to catch a hare. No hare or rabbit was found in their possession. It was held upon this that there was some evidence, and that they were rightly

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convicted of having used a net for taking game, though they had been unsuccessful. I have cited these out of numerous other cases, in order to show that the superior Courts will not quash a conviction where there is anything upon which justices may either from circumstantial or other evidence, reasonably conclude that the Defendant is guilty. In the case of *Copley* v. *Burton*, cited by Mr. Wadey, the facts were altogether in favor of the Defendant, so much so, that Mr. Justice Willes says: "There is an entire absence "of any conduct on his part active or passive which could "furnish evidence of an intention to break the law." In another part of his judgment the same learned Judge says: "If a "landlord opens his house during the prohibited hours under "circumstances which afford no explanation or excuse for "his so doing, the conclusion may fairly be arrived at that he opens it "for the purpose of supplying beer, &c., to persons who have no right "to demand it. It may be proper that the landlord should in such a "case be called upon to give some explanation." Apply this reasoning to the present case. What was the conduct of the Appellant, as disclosed by the evidence, when asked if Mr. Linklater was a lodger? Does he give any explanation, and is his conduct consistent with innocence? This was for the Magistrate to determine. On the whole, I am of opinion that the Court below had some evidence to warrant the conclusion that the Defendant supplied liquor during prohibited hours to one neither a *bonâ-fide* traveller nor a *bonâ-fide* lodger. That he was not the former was I think conclusively proved, and that he was not the latter, the Magistrate had a right to infer from the unrebutted evidence that Mr. Linklater was a householder and resident in the city, the endeavor to conceal the glass from the constables, and from the conduct and statements of the Respondent in their presence and hearing on the occasion referred to. If so strong a presumption of guilt arose from the circumstances mentioned in the cases cited, I am forced to the conclusion that there were facts and circumstances in this case sufficient to warrant the Magistrate in deciding that there was a case for the Respondent to answer. As he called no evidence, the Magistrate convicted, and I think such conviction must be affirmed, but inasmuch as the case was so carelessly got up by the prosecution, and much needless trouble in consequence given to the Court below and to this Court, I think no costs should be given.

BOUCAUT, J. — In this case the Defendant (Appellant) was convicted by the Police Magistrate, Mr. Beddome, upon an information preferred by the Informant (Respondent) under The Licensed Victuallers Act, No. 191, of 1880, s. 96—"For that the "Appellant being the holder of a publican's licence for a house known "as the Prince Alfred Hotel, situate in King William-street, "Adelaide, at the hour of half-past seven o'clock in the evening of "June 14th, 1885, the same being a Sunday, did unlawfully "supply to one Frederick Harvie Linklater, he not being a *bonâ-fide* "traveller or lodger, one nobbler of refreshment." Upon this conviction a Special Case has been stated under The Justices Procedure Amendment Act, 1883-4, which was argued before us by Mr. Wadey for the Appellant, and Mr. Wigley for the Respondent, and it is contended on behalf of the Appellant—1st. That there was no proof that a publican's licence had been issued to the Appellant; 2nd. That there was no proof that Mr. Linklater was not a lodger for the day and night. In order to prove the issue of the licence, the Respondent put in the *Government Gazette*, vol. 1, 1055, which showed that a licence had been granted to the Appellant by the Bench of Magistrates. The material point, however, was the issue of the licence, and not its being granted, and the *Gazette* which notified the issue of the licence was not put in. Now, the granting of the licence is (sec. 29) only a warrant authorising the licence to be afterwards issued on payment of fees, and it is common knowledge that licences often are granted which are never issued. Evidence might easily have been given of the actual issue of the licence, or evidence might easily have been given to justify the conclusion that a licence had been issued, without proof of its actual issue, as for instance by showing that the Appellant had written over his door, "Licensed Victualler" *Radford* v. *Briggs* (3 T.R., 637), or by, perhaps, showing that his house was being conducted as a licensed public house; but although such proof could, as I above said, easily have been given, it was never tendered. One policeman certainly said that he knew the Appellant's "hotel," but as hotels may be, and frequently are—I hope they will increase—temperance hotels, the mere statement that a policeman went to a hotel is no proof that a licence under the particular statute had been issued to the hotelkeeper. Persons laying informations under such highly penal statutes have no right to keep back evidence which could have been very easily produced, if in existence; if they do they must take the

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ordinary consequences. I think, therefore, the first objection is fatal. Coming to the second point the information charges that the person supplied was "not a lodger." This means a "lodger" in the ordinary sense, which is apparently the sense in which the Police Magistrate has dealt with the information, and in which, if the words of the Act were the same as the words of the information, it may be that he was right. But they are not. The words of the Act are: "Lodger for the day and night"—a very different thing. The word "lodger" in its ordinary signification means a person who resides in a place for a time, and in its legal signification, a person lodging under a contract —*Parkhurst* v. *Foster* (1 Salk, 388). Now, if either of these meanings was the meaning of the Act, a publican could give no refreshment to a person who came in from the country and stayed at his hotel during the day and slept there during the night after a ball or a concert. He would neither in law nor in common language be a lodger. He would be a guest. The Act, however, I think extends to a lodger in this sense, that is, a guest for the day and night, as well as to a lodger in the ordinary sense. The information, therefore, which negatives the lodger in the larger sense only discloses no offence, and a conviction founded on it without amendment cannot stand. Further, there may be evidence abundantly sufficient to show that a person is not a lodger in the ordinary sense, which is wholly insufficient to show that he is not a lodger in the sense of being a guest for the day and night. The proof that Mr. Linklater lives in Gilles-street raises no presumption that he was not such a guest. It was admitted that if he had lived at the Burra there would have been no such presumption. Suppose he had lived at Kapunda, or Gawler, or Glenelg, or Goodwood. Distance would be all-important on the traveller point, but I do not see how it can here affect the question of his being a guest. Even if he had lived at the Burra, that of itself would be no proof that he was a guest for a day and night at Appellant's hotel. He might have been a lodger at some other place, and then whether living at the Burra or not, the Appellant could not have supplied him. A hundred things might happen which would cause a man to be a guest at an hotel for the day and night, which are of such common occurrence in everyday life as to render the mere evidence that a man lives in Gilles-street no proof whatever that therefore on a particular night he was not a guest somewhere else. The covering of the glass by Mr. Linklater, and the refusal of publican to answer the question if Mr. Linklater was a lodger

(which he had a right to refuse, and which is immaterial), and his refusal to show the glass to the police-constable, would be evidence tending to show—they do not actually show—that alcohol was supplied, and might possibly support a conviction for selling spirits if that were the offence. But inasmuch as the offence is not the selling spirits, but the supplying refreshment of any sort to a person not a lodger for the day and night, the cogency of this evidence is not so clear. It is a highly penal statute, and therefore requires a strict construction, and I do not think difficulty of proof should prevail to extend the statute beyond what it says. The Legislature might change the onus of proof and throw it on the Defendant by express words, which has been very often done of late years in many statutes, and which has been done in England in respect of this very licensed victuallers' question. Or the same effect would have followed here if the exception had been in a different clause, according to a well-known rule of law. But as said by Lord Chief Justice Coleridge, in *Regina* v. *Aspinall* (London *Times*, July 4th, 1885), the Court should always lean to general principles, and general principles have always affirmed that there is to be a strict interpretation of Penal Statutes, a construction which the Appellant is therefore entitled to here. I am not prepared to decide, nor is it necessary that I should decide, that the evidence would be insufficient if the Information had disclosed an offence. But inasmuch as the Information does not disclose any offence, and inasmuch as I am not prepared to say that I am clear that the evidence would warrant a conviction for the true offence if properly charged, and inasmuch as further evidence might have been easily produced even after the objection was made, I am of opinion that the case ought not to be remitted to the Magistrate for amendment or further evidence, even if the first point were not in the Appellant's favor, and that on the second point also judgment ought to go for the Appellant.

WAY, C.J. — I regret to have to differ from my learned colleague, Mr. Justice Bundey. The points which have arisen in the course of the argument have been so fully dealt with in the judgments of my learned colleagues that I did not think it necessary to prepare a written judgment. This was a prosecution under a highly penal enactment, and the offence disclosed in the information involved a fine of not more than £50, and upon three convictions within the limited period of nine months, the person offending is liable to have his licence forfeited. There are no provisions in the

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Act throwing the onus of proof on the Defendant, and it is a well recognised rule that in all criminal charges or enquiries of a *quasi* criminal character the onus of proof is on the prosecution. As to the first point the prosecution had to prove that a licence had not merely been granted, but that it had been issued to the Respondent. The statute provides a very simple means of proving this by putting in the number of the *Government Gazette* containing a notification of the issuing of the licence, but for some reason the prosecution, although their attention was called to the point, did not choose to adopt the short and effectual mode of proof provided by the Legislature, but essayed to furnish a new style of proof of their own. Now the only thing they had proved was that a licence had been granted and that the Defendant kept an hotel (whether a temperance one or otherwise did not appear), and that he had some customers in the room in which he was carrying on his business. They did not show that the licence had actually been issued. It seems to me, therefore, that the prosecution has failed to prove the first point. On the second point it was incumbent on the prosecution to show that Mr. Linklater was not a lodger for the day and night. Two witnesses were called, one of whom said that he lived in Gilles-street east, but on being cross-examined they both stated that they were unable to say that he was not a lodger for the day and night. It was contended that that was within the knowledge of Mr. Roberts, the defendant, and that he could have given evidence to prove that he was not a lodger, but Mr. Roberts took the stand that every person charged with an offence was entitled to take. Before he could be called upon to give any evidence for the defence it was necessary that a *prima facie* case against him should be made out. Attention was directed to this point, but the prosecution, instead of calling Mr. Linklater himself, as they might have done, or some of the servants of the hotel, or other evidence which would have been readily obtainable, chose to stand on the testimony of the two witnesses before mentioned. Under the circumstances it seems to me that it would be flying in the face of the principles on which cases of this kind are conducted if we were to hold that a case had been made out. The question, therefore, as to whether the information should be dismissed will be answered in the affirmative, and the conviction will consequently be quashed. We shall not impose costs on the Prosecutor in this case, but it must be understood that in the future, even where there is a division of

opinion in the Court, we shall follow the rule laid down in *Copley* v. *Burton* (L.R. 5, C.P. 489), viz.: That where the onus of proving knowledge rests on the prosecutor and he fails to prove such knowledge, and the conviction be quashed for want of such proof, costs will be imposed on the prosecutor.

Conviction quashed.

Full Court.—In Banco.

In re ROBINSON.
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Practice—Administration—Bond—Public Trustee Act, 1880.

On applications for Letters of Administration to the Estates of Intestates it had been customary, since the passing of the Public Trustee Act, 1880, to give bonds in the name of "Henry Alfred Wood, Public Trustee, &c." Owing to the absence of H. A. Wood from the province a difficulty had arisen as to whom bonds were now to be given.

Held, that all bonds must be given to "Public Trustee" in his corporate capacity.

THE practice in Administration has been to give bonds to H. A. Wood, Public Trustee, &c., for getting in and administering the personal estate of an Intestate. Before the passing of the Public Trustee Act, 1880, bonds were given to the Curator of Intestates Estates. Testamentary Causes Act, 1867, s. 58. By the Intestate Real Estates Distribution Act, 1867, s. 10, the bond had to be given for administration of real and personal estate. The Public Trustee Act, 1880, s. 9, substitutes the Public Trustee for Curator.

B. A. Moulden—In *in re Robinson* cited *Wms. Exs.* (*8th* Ed., vol. 1, 539).

Homburg—In *in re Dunstall*, stated that a bond had been given to "W. D. Scott, the Public Trustee," he having been appointed Public Trustee in place of H. A. Wood.

WAY, C.J.—It was originally the practice for persons applying for Letters of Administration to the Estates of Intestates to enter into a bond to the Curator of Intestates Estates for getting in and administering the estate of the deceased according to law. By the Public Trustee Act, 1880, the Public Trustee was substituted for the Curator, and by s. 4 of that Act the Public Trustee is

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declared to be a body corporate by the name of the "Public Trustee." It is quite clear, therefore, that all bonds should be given, not in the name of the Public Trustee as a private individual, but in the name of his office, that is, to the "Public Trustee." That will be the practice in future.

BOUCAUT, J., concurred.

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WAY, C.J., and BOUCAUT and BUNDEY, JJ.

In the Supreme Court.—In Banco.

THE QUEEN *v.* HOWES.

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Embezzlement—Imprest Orders—Indictment—The Criminal Law Consolidation Act, 1876, *ss.* 193, 195.

The prisoner was charged upon an information laid under s. 193 of the Criminal Law Consolidation Act, 1876, for that being employed in the Public Service of Her Majesty, *and entrusted by virtue of such employment with the receipt, custody, management, and control of money*, he did by virtue of his said employment, and whilst he was so employed, receive and take into his possession certain moneys for and on account of the public service, and the said moneys fraudulently and feloniously did embezzle. The facts showed that the prisoner was entrusted by virtue of his employment with certain imprest orders, and not with money as stated in the information.

Held, that s. 195 of the Criminal Law Consolidation Act, 1876, which enacts that in informations of the above nature where the offence shall relate to any money or any valuable security, it shall be sufficient to allege the embezzlement to be money without specifying any particular coin or valuable security did not apply to the portion of the information relating to the entrusting of the prisoner by virtue of his employment; but only to the allegation of embezzlement in the information, and that the discrepancy between this portion of the information and the facts proved was not cured by the section.

CASE reserved by His Honor Mr. Justice Boucaut, upon a question of law for the consideration and determination of the Supreme Court. The following is a copy of the Special Case:—At the Adelaide Criminal Sittings of the Supreme Court held in August, 1885, Ephraim James Howes was tried before me charged upon an information laid under sec. 193 of the Criminal Law Consolidation Act, 1876, containing six counts, for that being employed in the public service of Her Majesty and entrusted, by virtue of such employment, with the receipt, custody, management, and control of money he did, by virtue of his said employment and whilst he was so employed, receive and take into his possession certain moneys for and on account of the public service,

and the said moneys fraudulently and feloniously did embezzle; and a seventh count, for that being employed in the public service of Her Majesty, and entrusted by virtue of such employment, with the receipt, custody, management, and control of money, by virtue of his said employment, whilst he was so employed was entrusted with, and did receive and take into his possession and custody, certain moneys, the moneys of Her said Majesty, and the said moneys fraudulently and feloniously did apply to his own use and benefit. Proof was given that the prisoner was employed in the Staff Office in the Public Service of Her Majesty, and that he received from the accountant in the same office, at different times, several Treasury imprest orders, which it was his duty to forward uncashed to the person named therein, and that it was contrary to his duty to cash the same. It was also proved that the prisoner paid these orders into his own banking account and used the same for his own purposes. It was objected on behalf of the prisoner, that although the actual embezzlement of these Treasury orders could, in the embezzlement counts, be charged as embezzlement of money by virtue of sec. 195 of the said Act, yet that section applied only to the actual charge of embezzlement, and did not apply to the introductory averment as to the nature of the prisoner's employment, and that, therefore, the information was not proved, inasmuch as the receipt by the prisoner of the Treasury orders did not prove the allegation that prisoner was entrusted by virtue of his employment with the receipt, custody, management, and control of money, and that on the contrary, the evidence showed that the prisoner was not by virtue of his employment, entrusted with the receipt, custody, management, or control of money, and that therefore, the evidence did not support, but negatived the information in this respect. I sent the case to the jury, reserving this case if necessary. The jury found the prisoner guilty, and I postponed sentence pending the decision of the Court. The information may be referred to if necessary or desired. The question for the consideration of the Court is: Whether sec. 195, aforesaid, extends to permit an allegation in the stating part of the information that the prisoner was entrusted with moneys when he was not entrusted with moneys. If the opinion of the Court is in the affirmative, the conviction is to stand; if in the negative, it is to be quashed.

C. C. Kingston for Prisoner—S. 193 of the Criminal Law Consolidation Act, 1876, requires the Crown to prove that the

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prisoner was entrusted by virtue of his employment in the public service with the receipt or control of either any chattel, or money, or valuable security. The information alleges an entrustment of the prisoner with money. The facts found by the jury show that the prisoner was entrusted not with money, but with a valuable security. There is, therefore, a variance in a material allegation in the information and in the facts proved. S. 195, on which the Crown will rely, has no application to the allegation in the information as to the entrustment, it only refers to the allegation as to embezzlement. *Roscoe* (N.P. Crim. Evd., 10 Ed., 476), *Regina* v. *Keena* (L.R., 1 C.C., 113).

The Crown Solicitor (*Mann, Q.C.*) relied on s. 195 of the Criminal Law Consolidation Act, 1876, which was passed to cure any variance of this description, and to enable the Crown to allege the entrustment and embezzlement in the information as money.

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WAY, C.J.—The prisoner was charged under s. 193 of the Criminal Law Consolidation Act, 1876. He received certain imprest orders which it was his duty not to cash, but to apply to a different purpose, and he cashed them and misappropriated the money. In order to make out an offence under that s. it was necessary to prove three things:—First, that the prisoner was employed in the public service; secondly, that he was entrusted by virtue of his employment with the receipt, custody, management, or control of some chattel, money, or valuable security; and thirdly, that he embezzled the same. The first requisition of the statute, that he was employed in the public service, was both alleged and proved. The second requisition of the statute had also to be both alleged in the information and proved. Under the corresponding section of the statute, as to private embezzlement (No. 189), it was no longer necessary to allege and to prove that the money or chattel embezzled was entrusted to the prisoner by virtue of his employment. That was left out of the English Consolidated Statute (24 and 25 Vic., c. 96, s. 68), and had also been omitted from section 189 of our Act; but it was retained both in England and in this colony in the section (No. 193) relating to embezzlement by a person in the public service. What was proved was that the prisoner was entrusted not with money, but with a valuable security. What was alleged in the information was that the prisoner was entrusted by virtue of his employment with money. The effect of this discrepancy between the allegation and ...ing and the actual facts is the question we have to decide. The

discrepancy is clear enough. How then can it be said that this discrepancy is cured? It was argued by the Crown Solicitor that it was cured by section 195; but what is provided for there simply affects the third requisition on this prosecution—that is to say, the embezzlement. It is not provided in section 195 that it shall not be necessary to allege and prove (as was alleged and proved here) that the prisoner was employed in the public service. It is not provided in that section that it shall not be necessary to allege and prove that the prisoner was entrusted by virtue of his employment with the receipt of specific money or specific chattels. What is provided is that "where the offence shall relate to any money or any valuable "security, it shall be sufficient to allege *the embezzlement* or fraudulent "application or disposition to be of money, without specifying any "particular coin or valuable security." The entrusting by virtue of the employment and the embezzlement are two different things. An inexactness of statement of what is embezzled is cured by the 195th section; but that section is silent as to the second requisition of the offence with which the prisoner was charged, namely, his being entrusted by virtue of his employment with some "chattel, money, or valuable security," which therefore must be both alleged and proved as alleged. The prisoner was charged with receiving *moneys* by virtue of his employment—it was proved that he received *valuable securities*, that is to say imprest orders. This discrepancy between the allegation in the information and the evidence is not cured by the 195th section, and as we have now no power of amendment, the case being reserved on this very point, the conviction must be quashed. However much I may regret the failure of justice which will happen in this case, it is my duty to administer and not to make the law, and I am bound to say that one material requisition to justify the previous conviction has not been supported.

BOUCAUT, J.—I agree with the judgment of my learned colleague. The point seems to me to be too clear for argument. I am not satisfied that it could have been amended at the trial by any power of amendment given by the Statute.

BUNDEY, J.—At first I had considerable doubts on this matter, but they have been to a considerable extent removed. I see no reason to differ from the judgment given. As the result of our verdict there will unquestionably be a failure of justice, but it is the fault of the law, and we cannot remedy it.

Conviction quashed.

WAY, C.J.

In the Supreme Court—Nisi Prius.

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INGHAM *v.* HARDY.

Company — Promoter's Liability — Free Shares — Prospectus — Misrepresentation—Material Facts—Fraud—Ambiguity.

In an action of deceit against the promoters of a Company the Plaintiff must prove actual fraud and that such fraud was an inducing cause to the contract and actual damage; it is not sufficient to show that the prospectus was silent as to the fact that some of the promoters received fully paid-up shares as remuneration for their services and the use of their names from another of the promoters who was entitled to such fully paid-up shares as stated in the prospectus.

THIS was an action brought by Robert Ingham against Arthur Hardy, William Christie Buik, and Henry Robert Fuller, to recover the sum of £199, damages sustained by him under the following circumstances. The Defendants, together with Hugh Fraser and James Scott, in the month of September, 1882, associated themselves together for the purpose of forming a Company to be called "The Glen Osmond Quarry Company, Limited." The Defendants, Buik and Fuller, together with Fraser and Scott, were to be the Provisional Directors of the Company, and a prospectus was prepared and issued, setting forth the circumstances under which it was proposed to form the Company, with the object of inducing persons to take shares in the Company. It was stated in the prospectus that the Defendant, Arthur Hardy, was the vendor of the property to be acquired by the Company, and that he and the Provisional Directors had subscribed among themselves for over 2,300 shares in the Company, and it was also stated in such prospectus that "The Vendor confidently believes "that with the increasing demand the annual output of building "stone, of crushed metal for paths, &c., and road metal, which latter "class will be considerably augmented by the erection of the crushing "machines before referred to, will be at least 60,000 yards per annum, "which can be raised and disposed of at a profit to the Company of at "least 15 per cent. on the paid-up capital." The Plaintiff saw a copy of the prospectus in one of the daily papers, and applied for 200 shares in the Company, and ultimately 135 shares were allotted to him. The Plaintiff applied for the shares on the faith of the statements in the prospectus. Subsequently he was informed that certain fully paid-up shares had been transferred by the Defendant, Hardy, to the Provisional Directors of the Company for the use of their names, and that of the 2,300 shares stated in the prospectus to have been

applied for by the Defendant Hardy and the Provisional Directors, Hardy had applied for 2,000.

J. H. Symon, Q.C., and *McDiarmid* for the Plaintiff—There has been a serious misrepresentation as to the shares taken up by the Provisional Directors. It should have been stated that the Provisional Directors were to receive shares from the Defendant, Hardy, for the use of their names. If the Plaintiff had known that Hardy was taking 2,000 of the 2,300 shares mentioned, and that he was to transfer to the Provisional Directors shares for the use of their names, the Plaintiff would not have applied for any shares.

Mann, Q.C., C.S., for the Defendant Hardy—The Plaintiff has not given any evidence that the Defendants made any misrepresentation or omission in the prospectus. It is absolutely necessary that the Plaintiff should prove actual fraud. The Defendant, Hardy, could give away his own shares if he pleased, they were his own property. The Plaintiff has not shown any misrepresentation on the part of Hardy. It was decided in *Arkwright* v. *Newbold* (L.R., 17 Ch., Div. 301) that if directors receive fully paid-up shares from the promoters of a company, which shares have been allotted to the promoters as part of the purchase money for the company's business, the promoters need not state in their prospectus the fact that such shares have been given to the directors. That case is on all-fours with this case. He also cited *Heymann* v. *European Central Railway Company* (L.R. 7, Eq. 154).

J. W. Downer, Q.C., A.G., for the Defendant Buik, in support of the nonsuit—There was not a suggestion of any circumstances which could implicate the Defendant Buik. The prospectus was the groundwork of the action, and at the time it was issued there was no evidence that any offer of free shares had been made to Buik, nor was there any evidence that such offer had been accepted.

R. G. Moore for the Defendant Fuller—It is necessary to prove actual fraud, and such fraud must be an inducing cause to the contract *Smith v. Chadwick* (50 L.T.N.S. 697).

Symon, Q.C., in reply—The onus is on the Defendants of rebutting the charges made against them by the Plaintiff.

WAY, C.J.—In this case there were three grounds stated, under which it was said the Plaintiff had sustained actual wrong by reason of the deceit of the Defendants. The first was that in the prospectus it was stated the Provisional Directors and the Defendant Arthur Hardy had subscribed among themselves for over 2,300 shares,

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leaving only 3,700 to be offered, and the Provisional Directors and the said Arthur Hardy did not subscribe for 2,300 as alleged, but, on the contrary, some or one of the Provisional Directors did not subscribe. It appeared that Mr. Hardy subscribed for a large number of shares, and that each of the Defendants subscribed for shares—Mr. Buik for 400, Mr. Fuller for 100, Mr. Scott also for 100, but Mr. Fraser did not subscribe. Now, it was represented on the face of the prospectus that they had subscribed among themselves, and the prospectus was attacked on two grounds by the learned counsel for the Plaintiff in his opening. One was, that anyone reading it would come to the conclusion, not only that all had subscribed, but practically for even amounts. The Plaintiff had given his evidence with great clearness and logical accuracy, and had said that if he had known that Mr. Hardy was subscribing for so large a number of shares and the others for such a small number, he would not have taken up shares. When a charge of that kind was made they must look at the representations. Now, the representation was not that they had undertaken to subscribe for a particular number of shares each, but that they had agreed among themselves to subscribe for 2,300. As regarded that number I think they had subscribed for nearly 3,000; therefore, the substantial representation that the promoters, including Mr. Hardy, had subscribed for a certain number of shares was not only proved, but it was also proved they had even subscribed for more. I agree with Mr. Symon that it might be said that it implied that every one had subscribed, whereas as a matter of fact, one had not. But what were the facts? On going to these promoters one of the witnesses, Mr. Brook, had informed them that he wished and expected each of them to subscribe for 100 shares, and this they agreed to do. There was nothing to show that either of the other Defendants knew that Mr. Fraser had not carried out his promise until Mr. Brook called attention to the fact at the meeting which was held for the allotment of shares. It seems impossible on that state of facts that a case of fraud could be submitted to the jury, and if he had any doubt on the subject it would be removed by the judgment in *Peek* v. *Gurney* (6 H.L., Cas. 377), in which it was held that a similar statement to this in a prospectus was not fraudulent.

There was a second ground stated, namely, the charge in connection with the third statement in the prospectus in which it was alleged that the vendors confidently believed that the output would amount to 60,000 cubic yards per annum. In order to support a charge of

fraud on this representation it would have to be shown—first, that there was not an output of that quantity; and, secondly, that the Defendants did not believe that there would be such an output. But there was no such evidence either on one point or the other.

The only remaining question was whether the omission from the prospectus of the statement that the promoters were to have 100 free shares amounted to a fraudulent concealment, which would support a charge of fraud. The question was not as had been admitted on both sides, whether, according to the laws administered by a court of equity, these gentlemen could retain their shares. That is a point in respect to which I am not called upon to express any opinion. Though they might not be entitled to hold one of these shares, and though they might be compelled to give them up for the sake of equity, yet it did not follow that this action was maintainable. In order to maintain this action there must be actual deceit. What was untrue in certain cases was made apparent as much by silence as by the most voluble communications we can imagine. The rule in regard to this class of cases was laid down by Lord Cairns in the case of *Peek* v. *Gurney*, in the House of Lords. Lord Justice James had also alluded to it in the case of *Arkwright* v. *Newbold* (L.R., 17, Ch: Div. 318). Mere omission of a statement is not sufficient ground for maintaining an action of deceit. We have heard that it frequently happens that promoters receive some remuneration for their services, and if this prospectus had said that the promoters were to receive certain fees, but was silent as to the fact that they were to receive 100 shares, then I think the commentary which Lord Justice James made in *Arkwright* v. *Newbold* would apply. But, as a matter of fact, the prospectus was absolutely silent on the subject. There was not one word which made any reference to promoters receiving any remuneration. If they did receive any remuneration according to some of the cases, certainly the weight of authority would show they would have to give it up because they were in a fiduciary position. I am unable to discover one word of representation on the subject. That being the case the law laid down that mere silence on a particular topic would not support an action of deceit. If the Plaintiff in this case had any doubt as to whether the Provisional Directors were to receive remuneration, he could have solved these doubts by asking a question. In no case has it ever been held that the mere fact of promoters receiving remuneration not being mentioned on the face of the prospectus would

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enable an action of deceit to be maintained; surely, if such were the case, there would have been abundant authorities on the subject, because it is well known that promoters do receive remuneration for the use of their names or for preliminary services rendered.

But there is another way in which Plaintiff's case might have been supported. It was suggested that whereas the purchase money was represented to be 2,000 paid-up shares, it was really 1,600, because 400 paid-up shares were to be divided among the Provisional Directors. I watched the evidence very carefully on that point, and that was why I was careful not to exclude evidence of what took place before the publication of the prospectus. As I understand the evidence, the purchase money was fixed in the draft prospectus before the suggestion was made by Mr. Brook that 400 shares should be placed by Mr. Hardy at his disposal. That is borne out by the agreement which was prepared, and which was dated September 6th. It therefore appears to me, that so far from there being any evidence that the purchase money was loaded for the purpose of providing for these paid-up shares, the amount fixed and inserted in the agreement was a sum of money and a number of shares altogether irrespective of those shares which were to be divided among the promoters, and when it was suggested that these 400 shares should be given to the promoters, Mr. Hardy accepted that sacrifice in order to carry out a sale which he was desirous of accomplishing. On these broad grounds I am satisfied that there was no deceit which would enable an action of this kind to be maintained.

But even if on these grounds the action could be sustained, it would be necessary to show that the Plaintiff was damaged. There was nothing to show that this property was not worth every penny paid for it. The prospectus was issued nearly three years ago, and it did not follow because shares were not worth perhaps more than two or three shillings to-day, that they were not worth twenty shillings for every pound then. To say that property was worth a great deal less three years after it was sold, did not afford us any indication of what was its value on the date of sale. On these grounds I take Mr. Symon's view of the effect of the evidence as to the agreement to transfer the shares, and should certainly not withdraw the case from the consideration of the jury, but for the fact that there is no evidence of fraud or of damages that I can possibly submit to them. The Plaintiff will therefore be nonsuited.

In the Supreme Court.—In Banco.

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WAY, C.J., and BOUCAUT and BUNDEY, JJ.

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June 23 and 24.

Building contract—Architect's certificate—Refusal without fraud or collusion—Local Court Act, 1861—*Equitable jurisdiction—Meaning of provision to administer "substantial justice" between the parties.*

The Plaintiff, a builder, sought to recover certain moneys from the Defendant, a building owner, for the performance of certain works under a contract and for extras. He did not obtain written orders from the architect for the extras, nor the architect's final certificate of the completion of the works, as required by the contract. There were many circumstances tending to show the architect was acting unfairly towards the Plaintiff, but it was not shewn that he refused or withheld the orders or final certificate fraudulently or in collusion with the building owner. The written contract shewed that the Plaintiff was to supply certain mantelpieces, but it was proved that the Defendants had agreed to supply these, and the Plaintiff had signed the contract on this understanding.

Held, Way, C.J., and Boucaut, J. (Bundey, J., dissentiente), that the Plaintiff was not entitled to recover in the absence of the architect's written orders for the extras and final certificate, and that he was not excused from obtaining these by any conduct of the architect short of fraud or collusion with the building owner.

Held, Bundey, J., that the Plaintiff was entitled, on the facts of the case, to recover, as a certain certificate given by the architect amounted to a final certificate embodying the amount payable for extras, and dispensed with the necessity of obtaining the architect's written order for extras.

Held, further, *per curiam*, that a Local Court has no jurisdiction to decide contrary to a written contract, or to relieve in spite of the contract between the parties where there is no fraud. It has no authority to adjust the rights of contracting parties where satisfied that a Court of Equity would interfere to reform according to the real intention at the time of making the contract. Local Courts are Courts of Law, and have no equitable jurisdiction.

Per Way, C.J., and Boucaut, J.—The meaning of the provision of the Local Court Act, 1861, that the Supreme Court shall not order a new trial if it be of opinion that substantial justice has been done between the parties, as defined by Hanson, C.J., in *Fullarton* v. *O'Leary* (5 S.A.L.R., 5), approved of.

APPEAL from the Local Court of Adelaide.

The Plaintiff, a builder, sought to recover from the Defendants certain moneys, being balance alleged to be due to him by the Defendants, building owners, for the performance of certain works under a building contract, and for certain extras in connection with the contract. Payments were to be made under the contract upon the certificate of the architect, and no works beyond those included in the contract were to be paid for without the written order of the architect. The Plaintiff obtained no written orders for the extras.

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The only certificate he was able to obtain from the architect was as follows:—

"CERTIFICATE.

"To MR. CHAS. BAKER & SON.

"I hereby certify that Mr. Shaw, the contractor for shops and dwellings, Gouger-street, has completed the works to my satisfaction, and according to plans, &c., and is entitled to receive the balance due to him on contract and extras. The damp course and fines for overtime I leave you to determine.

"H. C. RICHARDSON, Architect."

Although many of the facts tended to show that the architect was withholding these orders and certificates unfairly, it was not proved that he did so fraudulently or in collusion with the Defendants. The written contract shewed that the Plaintiff was to supply certain mantelpieces at his own expense, while it was proved on the trial in the Local Court that the parties agreed that the Defendants were to supply these at their expense, and that the contract was signed upon this understanding.

The judgment of the Local Court was as follows:—This is an action on a building contract brought by the Plaintiff to recover the balance due to him for the performance of certain works, the sum claimed being £400. The contract is in the ordinary form, and includes specifications, plans, and general conditions. The Plaintiff alleges that although on the face of the specifications it appears that he is to provide all mantelpieces, yet it was agreed at the time of the signing of the contract that the Defendants should provide them. The Defendants by their pleas deny this, and set up as a defence that it is a condition of the contract that the Plaintiff cannot recover payments unless the architect has certified, and that no sufficient certificate has been given by the architect. The issues resulting from these defences have made it necessary to apply to the evidence adduced several important principles of law. The Court has to consider—1. Whether it can accept the specifications as varied to the extent of the alleged parol agreement touching the mantelpieces. 2. Whether the decision of the architect is to be final and conclusive in the absence of fraud. 3. Whether the Plaintiff has a right to come to this Court in case it is shown that the architect has failed in his duty as arbitrator either by reason of improper bias or unfairness or indiscretion. Taking first the evidence as to the alleged parol variation of the specifications concerning the mantelpieces the Plaintiff says:—"My tender was for £5,258. When asked to reduce it I said "'No.' Baker, jun., said—'I have a lot of mantelpieces in stock.

"If I provide the mantelpieces will you do the contract for £5,000?' "I said 'No, I could not do it for the money.' I said 'If you give me "£5,100 and find the mantelpieces I'll do the work.' They all agreed "to that. They produced the contract. They requested me to "sign. I distinctly said I would sign on the distinct understanding "that the mantelpieces were to be no part of the specification, "and were to be struck out. They said 'Very well, and we are "very pleased. Sign and go on as expeditiously as possible.'" In cross-examination he said:—"I never read the specifications. I did not look to see if the part relating to mantelpieces was struck out. When they were required I applied to Baker. He said I had to find them. I reminded him that they had to be struck out. Baker said it was a pity there should be any misunderstanding. As a fact, he found the mantelpieces, except four." The Plaintiff is substantially confirmed in this statement by his accountant, Weir, who was present at the interviews. He says:—"Shaw said he would make it £5,100 on their finding the mantelpieces. Shaw in signing the contract said—'I sign this in consideration of your finding all the mantelpieces.' They said—'Go on, that will be all right.'" In cross-examination Weir said—"The architect said he would see the clause in the specifications would be struck out." In support of the Plaintiff one Siebert, an unsuccessful tenderer, was called, and stated that a few days after the contract was accepted Richardson, the architect, had told him that the contract was for £5,100, but that Baker was to find the stoves and the mantelpieces. For the defence Richardson is called. He says:—"The Bakers refused to allow the mantelpieces. It was discussed whether mantelpieces should be allowed. If it was agreed not to do the mantelpieces they would be struck out." In cross-examination he says:—"Baker and I went to get Shaw to sign the contract. Had it with us. I intended to ask him to reduce it. Baker said he had a lot of mantelpieces in stock—twenty. Can't say what he said it for; suppose he wanted to use them in the building. He said he would supply Shaw, but he would have to pay for them. Said he would supply the mantelpieces if Shaw would reduce to £5,000. Shaw refused. Shaw said—'I'll reduce to £5,100 if you will supply the mantels.' Baker said he could not give over £5,000." On being pressed Richardson made the following extraordinary statement:—"I had a conversation with Siebert after the contract was signed by Shaw. He asked me Shaw's price. Most likely I told him £5,100. He may have said 'That is rather long.' I never said 'Oh, but Shaw is getting the mantelpieces.' He

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did not say 'That's an item.' Do not recollect the conversation. Do not believe I ever said it. Cannot see how I could say it. I would not like to swear I did not say it. I am not prepared to say whether it was agreed on or not about the mantelpieces." He also says:—"I allowed £10 19s. for mantelpieces because Shaw paid for them. It is a mistake in allowing for them. I have only deducted for those he didn't supply." This last piece of evidence of the architect was in explanation of a document prepared by him, dated July 2nd, 1883, purporting to be a certificate for payments, in which he makes a large deduction for mantelpieces not supplied, and at the same time gives credit to Shaw for four mantelpieces paid for by the latter, but which, if the evidence for the Defendants is correct, Shaw was to provide. R. Baker then gives his account about the mantelpieces. Charles Baker is also called. This is the evidence relating to the alleged variation of the specifications. It is contended that the contract having been reduced to writing, evidence of parol variation cannot affect it, and this even although the variation was the very inducement to the Plaintiff to undertake the works. The general principle of the inadmissibility of parol evidence to contradict a written contract is well settled, and must in ordinary cases prevail, and although the right to reformation of agreements forms no ground for the exercise of the jurisdiction of this Court, yet we have authority to adjust the rights of contracting parties where we are satisfied that a Court of Equity would interfere to reform according to the real intention at the time of making the contract. It appears to us that not only was it the intention of the parties known to the architect at the time of the signing of the contract that Baker should find the mantelpieces, and that Shaw should get £5,100, but that it continued to be the intention of the parties throughout. The evidence satisfies us that Baker and Richardson induced Shaw to sign on a distinct promise that the clause as to the mantelpieces should be struck out. It was their duty to have struck it out, and it is our duty to read the contract as if the words were struck out, and not to permit the Defendants to benefit by their own or their architect's breach of this duty. We do not doubt that Richardson made the statement sworn to by Siebert. We do not doubt that Richardson knew from first to last that he was acting improperly in adopting any course inconsistent with the alleged agreement. If we are in error, notwithstanding these findings, in not applying the ordinary rule of law above referred to, then we must find that, assuming Shaw had to find mantelpieces,

he did find the mantelpieces by procuring them from Baker. Whether he has to pay Baker for them as a purchase independent from the contract is a matter not raised, but certainly if he did as a fact procure them and place them in the building, it cannot possibly be a matter for the architect to decide upon by way of deductions. If Richardson is truthful in his evidence when he says "Baker said he would supply Shaw with mantelpieces, but he would have to pay for them," then Richardson himself shows that this was a matter for set-off and not matter for deduction by the architect in giving his certificate. Shaw is corroborated by his accountant, by Siebert, by the admission of item of 19s. 2d. for carriage of mantels from Baker's premises to the building, by Richardson's own act in allowing for four mantelpieces in one of the certificates, and by the circumstance that without any explanation from Baker he did supply all the requisite mantelpieces except the four above referred to. Next in importance to the question just discussed is that of the finality of the architect's decision, and whether the Court can, on any ground other than fraud, go behind the architect's acts and certificates and enquire into the question of amount to be received by the Plaintiff. Here again we are met with a perfect rampart of cases at law showing that, except for fraud, the architect's decision is final and conclusive. Other cases show that his duties are not merely ministerial, but of a quasi-judicial character, and that it being mere matter of opinion left by consent of the parties to his sole judgment they cannot complain if he errs in opinion or judgment in deciding the questions submitted to him. Assuming that the architect's position here is of a judicial character, such as would be occupied by an arbitrator required to decide not merely ministerial matters, then upon the contention of the Defendants the parties to the contract are under no circumstances to be entitled to resort to the tribunals of the Law Courts. Let the conduct of the architect be ever so remiss, his bias, his indiscretion ever so patent, still, it is said there is no means of being relieved from his decision. Now we take the law to be that no absolute ouster of the ordinary legal tribunals—even by express agreements—can be valid, because such ouster would be contrary to public policy—*Scott* v. *Avery* (5 H.L. Cas., 811); that doubtless contracting parties may agree that no action shall be brought till an arbitrator has been appealed to—*Russell* v. *Pellegrini* (6 E. and B., 1020). But if the persons so agreeing have done everything in their

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power to obtain a proper decision from the arbitrator so appointed, and have failed, then we know of no rule which prevents the persons affected by such failure from resorting to an action. The Defendant says that no final certificate has been given. There is abundant evidence that the architect has been pressed for his final certificate. There is also ample proof that the works have been completed for over a year. If the Defendants are correct they are admitting that the architect is guilty of the grossest delay, and have enabled by such delay parties to resort to the Courts of Law. In the course of the argument the case of *Pawley* v. *Turnbull* (3 Gif., 70) was referred to. This case contains in express terms a complete refutation of the contention that the decision of the architect can only be challenged on the ground of fraud. The case is in 1861, and both the architect and the building owner are made defendants. There the builder had been unfairly treated by the architect. The work had been taken out of the builder's hands without sufficient cause, and when only about £200 worth of work was required to be done to complete the contract the architect put on other persons to do this work, and charged the builder some £1,200 for its completion. He had omitted to make proper valuations of the condition of the building when he took the work out of the builder's hands, and for these and other reasons the Court decreed him to have acted unfairly, improperly, and indiscreetly, and opened up all the accounts and directed payment of everything claimed, fixing the building owner with the consequences of the architect's conduct. This was in a Court of Equity, but not in the exercise of any special equity jurisdiction. The case was decided on the same broad principles of substantial justice which this Court is empowered to administer, and without any suggestion of the absolute finality of the architect's certificates on account. Applying this case of *Pawley* v. *Turnbull* to the evidence before us, we take it that it is our duty to assist the Plaintiff by ignoring the powers of certificates and decisions of Richardson. We find him endeavoring to support the Bakers, for whom he was agent in an improper claim respecting the mantelpieces, well knowing as he must that it was no part of the Plaintiff's duty to provide mantelpieces. We find him seeking to impose on the Plaintiff heavy fines for delays, when he must have known that any delays that occurred were at the door of himself and the Defendants. We find him endeavoring to shift the blame of his own mistake as to the drain pipes in California-street on to the building, and refusing to

allow anything for the extra work entailed by the drains having to be altered. We find him supporting the Bakers in the pretence that instead of the mere cost of certain tiles omitted from the damp course being deducted Shaw had agreed that some indefinite sum by way of damages or compensation was to be paid for such omission. We find him refusing to allow for piers pronounced absolutely necessary for the security of the building, which he himself had negligently omitted from the plans and specifications. We find him insisting upon certain extra enrichments ordered by him as being included in the contract and plans, when we can see with our own eyes that the enrichments are in neither. He admits that he did not allow anything for the extra size of houses and extra thickness of walls referred to in items 5 and 6—in all £95 2s. —but says he ought to have allowed something for that; also that in respect of other matters he ought to have allowed them. He discloses by the documents a desire to make unfair and improper deductions in the Defendants' favor, and now at the trial his memory appears to be so muddled and uncertain about everything that it would be impossible for him to enter upon the consideration of any certificate yet required to be given, with any hope of doing justice to the parties concerned. These findings on the evidence impel us to ignore Richardson's certificates, whether they are final or not, and to deal with Richardson's decisions and certificates as those of a person having an unfair bias, possessed of improper prejudices, and highly indiscreet in the performance of his duties. Having thus dealt at length with the questions of law involved, we do not propose to enter minutely upon the evidence adduced respecting the omission of the tiles in the damp course. We only say that we prefer to give credence to the Plaintiff's account of this, supported as it is by the evidence of several credible witnesses. Neither do we intend to deal minutely with the extras, because the evidence of Swan, Rees, and Shaw satisfies us that the charges made are fair and reasonable, and in many instances below the proper usual charges. As regards the absence of written orders for these extras we do not propose to make the Plaintiff suffer on that account, because he did all in his power to procure such, and did the extras on Richardson's promises that they should be forthcoming. The non-performance of these promises is a further illustration of the unfair way in which the architect conducted himself. We find that the Plaintiff has claimed a sum considerably below what he was entitled to. There will therefore be a verdict for the Plaintiff for £400.

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The Defendants appealed from the judgment.

Symon, Q.C., for the Plaintiff, the Respondent—Substantial justice has been done between the parties, and therefore in compliance with s. 61 of the Local Court Act, 1861, the Court will refuse to disturb the verdict. The verdict was founded on every principle of justice, and the last words of the judgment of the Court were :—" That we find the " Plaintiff has claimed a sum considerably below what he is entitled " to." The balance of the extras was admitted by the Appellant, but he sought to remit payment because the architect had not given written orders for them. The architect had agreed to supply these, and it was a breach of faith with the Respondent for him to refuse to do so. The certificate given by the architect, although excepting the items of damp courses and fines for overtime, was final. The parties had treated it as such and had acted on it, and the Appellant had paid £191 under it before the action. The Respondent is entitled to hold the judgment awarded him in the Court below by the magistrates who had had an opportunity of hearing the whole of the evidence, and were consequently as business men enabled to give an equitable verdict. He cited *Bleechmore* v. *Richardson* (not reported.)

The Attorney-General (Downer, Q.C.) and *Nicholson* for the Appellants—It is apparent that the Respondent, under the conditions of contract, was not entitled to recover till he had obtained the certificate of the architect in respect to the amount due to him ; also, he could not recover for extras without he produced the written order of the architect. Plaintiff cannot be excused from this condition unless the architect declines to grant them fraudulently or in collusion with the Defendants. The Local Court has no power to reform a contract and has no equitable jurisdiction. He cited *Stevenson* v. *Watson* (40 L.T., N.S., 485), *Clarke* v. *Watson* (11 L.T., N.S., 679), *Roscoe* (N.P. 14 Ed. 16), *Richards* v. *May* (L.R. 10, Q.B.D. 400), *Fullarton* v. *O'Leary* (5 S.A.L.R., 3).

October 21.
BUNDEY, J.

BUNDEY, J.—The nature of this action, and the points raised on the appeal, are so fully dealt with in the judgment of my learned colleague that it is unnecessary for me to recapitulate them. The learned Attorney-General in his clear and forcible argument convinced me that Local Courts do not possess the jurisdiction in equity claimed for them and acted upon by the Court below in this case, and if its determination depended on this point I should be disposed to give effect to the Defendants' contention, but upon the grounds subsequently stated I am of opinion that an action at law was main-

tainable, and that, consequently, the Local Court had jurisdiction; and, moreover, that in the final result substantial justice was done by their verdict. I am inclined to agree with the Attorney-General's argument, that the finding on the grounds stated in the Court below in reality substituted a new contract between the parties, and I am unable to agree with the learned Special Magistrate in any part of his remarks when treating of the assumed equitable jurisdiction of the Court, or that there was anything shewn by the evidence to relieve the Plaintiff from attaining and proving a final certificate by the architect. I have had the privilege of reading the judgment to be delivered of my learned colleague, Mr. Justice Boucaut, and in that part of it which deals with the extensive equitable jurisdiction claimed in this case for Local Courts I fully concur. There are additional reasons for shewing how untenable such a proposition is, but those given by my learned colleague are to my mind sufficiently conclusive; and I therefore pass on to the consideration of the question of whether or not the Plaintiff can hold his verdict upon other grounds. As previously stated, assuming the Local Court had jurisdiction to entertain the Plaintiff's claim at law, I think substantial justice was done between the parties by the verdict in the Plaintiff's favor; for, although I am at variance with the learned magistrate's reasoning and decision on the point of the Court's equitable jurisdiction, I do not feel called upon to dissent from his strictures upon the architect's conduct throughout as shewn by his own and the other evidence adduced at the trial, and if the Court below had jurisdiction to entertain and adjudicate upon the Plaintiff's claim the evidence and the demeanor of the witnesses was entirely for their consideration. It is of great importance that building owners should not be fleeced by unscrupulous contractors, it is equally important that honest contractors should have their just claims allowed and no injustice done to them by the architect employed by the building owner, who may be incompetent, negligent, or vacillating. In order to determine the rights of the parties here we must, in the absence of fraud (which is not alleged), look to the contract between them. The only clauses to which it is necessary to refer for the consideration of this case are Nos. 5 and 21, which are as follows, viz.:—"V. No "works beyond those included in the contract will be allowed or paid "for without an order in writing from the architect, who shall be sole "judge during the progress of the works in all matters or questions "arising out of this contract, so far as relates to the quality of

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"material and workmanship, the meaning of the specifications, the "rate of progress, or the general management of the works; "provided that should the contractor be called upon to perform any "work that he may consider is not defined in the specifications or "drawings, but which the architect shall rule is contained therein, or "for which he shall refuse to give an order, the said contractor shall, "nevertheless, in all cases perform the said work as directed, but may "have such matter decided by arbitration if the contractor shall, "before commencing to perform such work, have given notice in "writing to the architect of his desire to have such matter so decided, "but not otherwise." "XXI. Payment shall be made to the "contractor at intervals during the progress of the works at the "discretion of the architect, upon certificates in writing under his "hand, at the rate of 75 per cent. on the value of the works executed, "in sums of not less than £500 at a time, 24 per cent. shall be paid "after architect has signed a certificate that the contractor has "executed and completed the works to his satisfaction, and the "balance of 1 per cent. shall be reserved for the period of one month "from the date of the certificate of completion, in order to ensure the "execution of any reinstating or repairs that may be required by "the architect during the above period, and which works shall be "performed to the satisfaction of the architect before the contractor "shall be entitled to receive the said balance; and the contractor "shall not be entitled to receive any payment whatsoever, whether "progress or final, except upon the certificate of the architect. The "contractor shall admit the architect to the works and to the "contractor's workshops at all reasonable times during the progress "of the contract." It will be observed on a careful perusal of the preceding extracts that in No. 5 it is provided that "No "works beyond those included in the contract will be allowed or "paid for without an order in writing from the architect, &c." The order here referred to is clearly the preliminary one for the work, and has no bearing upon its "price." The condition is, that it should be so ordered to entitle to subsequent payment. Of course the exact price might not be ascertainable until the order was fulfilled. In the 21st condition, "Payments are to be made at intervals during the "progress of the work at the discretion of the architect upon "certificates in writing under his hand at the rate of 75 per cent. on "the value of the works executed, &c. Twenty-four per cent. on "the signing of the final certificate and the balance of 1 per cent. shall

"be reserved for the period of one month from the date of the "certificate of completion . . . and the contractor shall not "be entitled to receive any payment whatsoever, whether progress or "final, except upon the certificate of the architect." On July 17th, 1884, the achitect gave the following certificate :—

"To Mr. CHARLES BAKER & SON.

"I hereby certify that Mr. Shaw, the contractor for shops and dwellings. Gouger-street, has completed the works to my satisfaction, and according to plans, &c., and is entitled to receive the balance due to him on contract and extras. The damp course and fines for overtime I leave you to determine.

"H. C. RICHARDSON, Architect."

The learned counsel for the Plaintiff (Mr. Symon, Q.C.) contends that this is a final certificate, and upon it the Plaintiff was entitled to recover, and that it properly left open the question of amount, as under the contract the architect has no power or right to decide on the final balance or deductions after completion of the work, and that such were correctly inquired into and determined in the Plaintiff's favor by the Court below. The learned Attorney-General contends that this is no final certificate, that the price of extras could not be recovered without the written order of the architect in the first instance, and that without such orders being produced the Plaintiff is not entitled to recover, and that with respect to extras the Plaintiff's only remedy is under the arbitration clause, No. 5, already referred to. After very careful consideration, and on perusal of a case not cited at the bar, somewhat on all fours with the present, viz., *Pashby and Anor.* v. *The Mayor, &c., of Birmingham* (18 C. B. 2), I have come to the conclusion that the certificate is a final one. The facts in the case cited were in many respects similar to those disclosed by the evidence in this case, and the Plaintiff was held entitled to recover. The same case deals more or less with several of the other points raised here. No alterations were to be made without the written authority of the architect, who was to determine their value ; no payments were to be made without the production of the architect's certificate of the work done, and there was the following condition :—"No further payments "shall be made to the contractors until within three calendar months "after the architect shall have certified the completion of the whole "work to his satisfaction." Upon these words it was held that the certificate of final completion was sufficient without mentioning the amount remaining due. I have already called attention to the wording of the 21st provision. With respect to the final certificate in this case,

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the contractor is entitled to be paid "any" balance "after" the architect has signed a certificate "that the works have been complete to his satisfaction," and although there is a further provision that the contractor is not to receive any payment, whether progress or final, except upon the certificate of the architect, still I am of opinion that this does not qualify the nature of such final certificate as previously defined, or entail upon the architect the duty of inserting in it any statement other than "the completion of the work to his satisfaction." If there is a difference of opinion as to the amount due, and it cannot be settled otherwise, then the Court must be, as it has been, appealed to—the certificate, in the absence of fraud, being evidence of the due completion of the work in terms of the contract. In this case the architect inserted in the certificate some words leaving open to his employer a question of deductions for a damp course and for fines. The former of these matters had been discussed, and, according to the finding in the Court below, an agreement arrived at respecting it between the parties, it had nothing to do with the extras; the latter item for fines was a question for the Court to determine in case of dispute, and they found in the Plaintiff's favor. I do not think the insertion of these two matters in any way affect the finality of the certificate, they are merely surplusage, more especially as the contract did not, in my opinion, entitle the architect to make any binding certificate "of the final balance between the parties," and that the certificate was taken by the Defendants themselves to be a final one is evident from their having paid the 1 per cent. deduction upon its being given. Upon this point I have the misfortune to differ from my learned colleagues. I do so with diffidence, because of the great respect I entertain for their opinions, which naturally induces a mistrust of my own; nevertheless, after much consideration I am unable to divest my mind of the conclusion formed on hearing the argument and strengthened by subsequent deliberation, viz., that by the terms of the contract in this case, the final certificate of completion includes the right for the Plaintiff to be paid whatever amount was due to him. I do not think two certificates were necessary; the one given covered the extras, and entitled the Plaintiff to recover any amount he was rightfully entitled to for them as well as for the balance on the contract proper. Cresswell, J., in *Pashby* v. *the Mayor, &c., of Birmingham* before cited, says:—"The certificate of final completion is clearly "sufficient without reference to the amount that may be due to the

"contractors whether in respect of work done under the contract or of "alterations or additions." That is precisely the view I venture to think is applicable here. Holding this view it is unnecssary to consider the minor questions that have been raised, for if the major proposition is established, viz., that the certificate is a final one, it seems to me they necessarily vanish. The case of *Goodyear and Anor.* v. *The Mayor &c., of Weymouth* (35, L.J., C.P. 12) shows that a final certificate by the architect precludes either party from raising the question as to whether or not there were previous orders in writing for the extras, and I think any Court of Justice would strain to prevent a building owner knowingly allowing a builder to do extra work, adopting such work and its benefit and then declining to pay for it because his agent, the architect, forgot or neglected to give the contractor a written order. In some cases, no doubt, great injury might be done to the building owner by such neglect. I am now only referring to the facts found by the Court below in this particular case, and such Court held that the contractor had benefited the building owner largely in excess of the claim made upon him. I am aware that there are cases that have been decided shewing the necessity for the production of these written orders, but these cases have gone upon a very different state of facts. If this was a final certificate the Plaintiff was entitled to sue at law under his contract, and it was unnecessary to raise any question of the equitable power or jurisdiction of the Local Court. The Plaintiff upon a properly formed claim did sue at law for a balance due in respect of such contract and for extras, and the Court below found in his favor. I think they were justified, on the evidence, in so finding that substantial justice has been done between the parties, and that the appeal ought to be dismissed.

BOUCAUT, J.

BOUCAUT, J.—This is an appeal from the judgment of the Local Court of Adelaide for the Plaintiff in a building case, in which the builder sues the building owner, *inter alia*, for the cost of extras although there is no architect's written order for some of those extras, and although the want thereof is not covered by any express enumeration in the architect's final certificate for payment. As usual in such cases there are many disputed items, and several questions raised of more or less importance. Judgment, however, on one or two of these questions will be sufficient to decide whether this appeal is to be so far successful as to result in a new trial. One of those questions is, whether a Local Court has jurisdiction to decide

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contrary to the contract, or to relieve in spite of the contract between the parties where there is no fraud; another is, whether supposing a Local Court has such a jurisdiction, there are sufficient grounds in this case to warrant such decision or relief. An affirmative answer to the first of these questions was given by the learned Stipendiary Magistrate on two grounds involving two different but most important principles; first, on the ground that "although the right to reformation of agreements forms "no ground for the exercise of the jurisdiction of this Court, yet we "have authority to adjust the rights of contracting parties where we "are satisfied that a Court of Equity would interfere to reform "according to the real intention at the time of making the contract;" secondly, "on the ground that the Local Court had power to administer "the same broad principles of substantial justice as were administered "by the Court of Chancery in the case of *Pawley* v. *Turnbull* (3 Gif. "70)." In my opinion the Local Courts have no such jurisdiction either on the one ground or the other. The proposition that Local Courts have authority "to adjust the rights of contracting parties where we are satisfied that a Court of Equity would interfere to reform" is to my mind not arguable. It is altogether too large, and cannot possibly be supported. Such a contention I never heard of before, and it is not warranted by anything in the Act, or by any legal decision. The proposition that the Local Courts are empowered to administer the same broad principles of substantial justice as the Court of Chancery in *Pawley* v. *Turnbull*, although perhaps more arguable than the other proposition with which I have already dealt, is, in my opinion, equally unsupported by the Act or by authority. Local Courts are Courts of Law. It is true that in certain cases decisions of the Local Court are to be according to equity and good conscience; but that by no means makes them Courts of Equity, or gives them the extraordinary jurisdiction claimed here. As said by Sir Richard Hanson, C.J., in *Fullarton* v. *O'Leary* (5 S.A.L.R., 5):— "I understand that provision of the Local Courts Act to mean that if "it appears that some technical question of law involving no impor- "tant principle has been wrongly decided, that the Supreme Court "shall nevertheless not order a new trial if it be of opinion that "substantial justice has been done between the parties; but I do not "think it was intended to allow a departure from such a rule of law "as that a deed must not be contradicted by parol evidence." I have heard frequent expressions of judicial opinion to the same effect from

the learned Judge who was lately Primary Judge in Equity, and I do not think that the jurisdiction of Local Courts can be extended further than so explained by Sir Richard Hanson. My judgment, and I believe the judgment of the Court in *Bleechmore* v. *Richardson*, quoted by Mr. Symon, proceeded upon the same reasoning as that of Sir Richard Hanson in *Fullarton* v. *O'Leary*. Being thus of opinion that the Local Court has not the jurisdiction which it has exercised, it follows that in such a case as this there must be a new trial for the more satisfactory sifting of the figures in dispute, free from any errors occasioned by this exercise of excessive jurisdiction; because the whole judgment has proceeded upon a wrong basis, and in so complicated a case it would appear to me impossible to say whether or not substantial justice has been done. I think it proper to say that I do not consider that the Plaintiff has brought himself within the case of *Pawley* v. *Turnbull*, even if the Local Court had the jurisdiction claimed. I am not fully satisfied with the reasons given for the judgment in *Pawley* v. *Turnbull*, which, in that respect, stands by itself and is opposed to the reasoning of numerous other decisions. I should therefore hesitate before adopting those reasons, even sitting as a Court of Equity. I certainly would not extend them. The learned Vice-Chancellor, in his judgment, says that the conduct of the Defendant, the architect, "was not of that discreet, impartial, and "fair description which it ought to have been." If that means that a Judge may set aside the contract of the parties and make a new contract for them whenever he thinks an architect "has not been so "discreet, impartial, or fair as he ought to have been," then I dissent, and will not follow such law until it is so affirmed by further authority. The learned Vice-Chancellor afterwards finds the architect to have been guilty of unfair and oppressive conduct; but, even if the unfair and oppressive conduct established against that architect warranted that decision, it by no means follows that in every case where an architect has been unfair and oppressive the contract of the parties could be set aside even in a Court of Equity. And it must be observed also that, although the Vice-Chancellor expressly excluded fraud from his judgment, yet I think if that case is to be followed it will be on the ground that the total sum of misconduct there against the builder really amounted to fraud, as hinted at by *Mr. Emden* in his work on building contracts. This, however, is a very different case. In *Pawley* v. *Turnbull* the architect wanted to mulct the builder in £1,400, although only £200 was due. Here there is a dispute at the

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very utmost of some £450 in a contract of £5,100 with extras, which make it, in round numbers, £5,600; and here it is not alleged, as in *Pawley* v. *Turnbull*, that the builder was deceived into signing the contract. The subsequent dispute here about the mantelpieces is quite a different thing. I would further point out that in *Pawley* v. *Turnbull* the architect was before the Court, and that therefore the Vice-Chancellor did not decide adversely to him without hearing him. He clearly ought to be heard before he is condemned for oppressive and unjust conduct, and certainly oppressive and unjust conduct on the part of an architect ought not alone to be sufficient to render the employer liable where the builder has aided the architect to break the contract, the employer being ignorant of the breach and innocent of the oppression. Full justice in such a case as *Pawley* v. *Turnbull* could seldom be done unless the architect were before the Court, because it might be that the architect alone was so blameable and the building owner so excused that the architect alone ought to pay, or it might be that the building owner, even if blameable, was blameable in so slight a degree that he ought to be excused from costs or recover them over from the architect. Here the architect was (probably properly enough) withdrawn from the suit, therefore on this ground alone *Pawley* v. *Turnbull* is inapplicable. It may be that an architect is unskilful, or that he is hard, or too ready to think the building owner right and the builder wrong—often the complaints against architects are that they are too ready the other way—it may even happen that the builder may have an action against him for breach of some promise or undertaking, as between themselves; all this and more may be, and yet the builder be precluded from any remedy against the building owner. Whether the builder has any remedy against the building owner depends—at law upon the contract, in equity upon fraud and collusion. What is the contract here? Speaking generally, for I need not cite the words of the contract in this case, it is that extras are to be only paid for on the architect's written order, and on production of the architect's certificate for payment. Now as to some of the extras there is no written order, and in my opinion there is no certificate for payment sufficient to dispense with such written order. Therefore those extras cannot be recovered. No doubt extras can in some cases be recovered even—although there be no written order—if the architect's final certificate (or certificate for payment as the case may be) sufficiently enumerate them so as to make it clear that the final

certificate operates thereon, or if the written order has been waived by the building owner. But here, as to some of the extras at all events, there has been no waiver, and the final certificate is general and does not enumerate or specify any particular extras or fix any amount that would necessarily cover the disputed extras. As said by Erle, C.J., in *Russell* v. *Sa Da Bandeira* (13 C.B., N.S., 201):—"In "many cases the Court, though satisfied that the builder acting upon "the faith of an oral request has fairly done the work for which he seeks "to be paid, has felt itself to be fettered by the express terms of the "bargain the parties have entered into. We cannot yield to sugges- "tions of hardship on the one side or the other, though I must confess "that, according to my experience, the hardship has most commonly "been upon the side of the employer. . . . He, the builder, "might have declined to comply with these requests unless they were "made in writing. I feel bound to give effect to the terms of the "contract, and to hold that the extras and additions supplied, not "under written orders, during the performance of the contract form "part of the contract for the construction of the ship, and are not to "be paid for by Defendant." And in the same case Byles, J., said:—"The contractor has no right to complain if he loses the "price of extras and additions, which in disregard of the stipulation he "has entered into, he furnishes without getting a written authority." The same learned Chief Justice, in *Clark* v. *Watson* (11 L.T., N.S., 679), in dealing with the question of want of certificate, said:—"Every "man is master of the contract which he chooses to make, and it is of "vast importance that contracts should be enforced according to the "words and intention of the parties. No certificate was produced, "but the Plaintiffs say that the surveyor wrongfully and improperly "neglected and refused to give his certificate. This is not sufficient. "If the declaration had alleged that the Defendants and their sur- "veyor colluded to cheat the Plaintiffs of the proper remuneration "of their work, there are abundant authorities to show that the "Defendants would not be allowed to do so. The object of the "declaration is to substitute the verdict of a jury for the certificate of "the surveyor." The same learned Judge said also, in *Goodyear* v. *Mayor of Weymouth* (35 L.J., C.P., 13):—"We cannot enquire "whether the architect allowed properly or improperly; though of "course, if his conduct was fraudulent, his determination would be "void." The principles involved in these latter expressions of opinion are as applicable to the want of written orders as to the want of

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certificates where rendered conditions precedent by the contract. In the absence of fraud, therefore, the law, in respect of such a contract, seems to me to be this: If there be no certificate, the builder cannot recover at all; if there be no written orders for extras, he cannot recover for extras. But this latter proposition is subject to this qualification, in such a contract as this, that where the final certificate of payment clearly shows that extras are included, they can (and the Courts will lean this way) be recovered, as in *Goodyear* v. *The Mayor of Weymouth* (35, L.J., C.P., 13). Here, inasmuch as there was no written order, and as the final certificate for payment does not cover extras, those not covered can not be recovered. The intermediate certificate relied on by Mr. Symon does not operate in the same manner. As pointed out in the House of Lords, in *Tarsis Sulphur and Copper Company* v. *McElroy and Ors.* (L.R. 3, App. Cas. 1040), such certificate is equivocal, and is as consistent with there being no order for extras as with there being an order for extras. It was made out with a view to regulating the advances and shewing how much should be paid on account, and not at all as shewing how much was to be paid ultimately upon the final reckoning and account; and is therefore of no assistance to the Plaintiff, as argued by Mr. Symon. It would be unfortunate if the law were otherwise. Courts have only to interpret the contracts made by parties themselves, and not to make new contracts for them; always, of course, having the right to set aside contracts, or qualify them in case of fraud. Here it is conceded that there is no fraud, of which indeed there is no evidence. Therefore the contract cannot be altered, and the Plaintiff is as much bound by it as the Defendants. The law has been recently expounded in the same spirit from another point of view. In *Richards* v. *May* (L.R. 10, Q.B.D. 400) Cave J., held the architect's certificate to be conclusive in favor of the builder. It seems to me that it would be most unjust to say that a different law should be applied to the building owner as would be the case if the Plaintiff's contention on this point were to prevail. If the building owner is to be bound conclusively by a certificate, he ought not (always, again I say, in the absence of fraud or collusion) to be bound where there is no certificate covering extras, and no written orders in respect of them. Mr. Symon argued that the case of *Stevenson* v. *Watson* (L.R. 4, C.P.D. 148), cited by the Attorney-General as being in favor of the Defendant, was no authority in this case, being an action against the architect. But I think it is an authority. It clearly affirms the principle that no action

will lie against the architect unless there be fraud or collusion; and the Chief Justice, in giving his judgment, expressly says:—"Moreover, it "seems to me that it is so provided for by the contract, and that the "true view of the contract is that presented by Mr. Wills—viz., that "before the Plaintiff can recover sums of money from the building "owner, there must be the certificate of the architect to ascertain "what sums are due from the building owner to the Plaintiff." The Chief Justice goes on to say:—"Where, indeed, the building owner and "the architect collude together, and, in collusion, the architect "fraudulently abstains from doing his duty towards the builder, there "is authority for saying that he can maintain an action against the "building owner—*Batterbury* v. *Vyse* (2 H. & C., 42)—or the architect "—*Ludbrook* v. *Barrett* (36 L.T., N.S., 616);" and the whole of his reasoning implies (as, indeed, the prior quoted words shew) that unless there be such fraud or collusion neither can be sued. If it were otherwise, much wrong might be done, and building owners rendered powerless. The building owner relies on the safeguards of his contract. If the Plaintiff's case were established, then a building owner might be ruined and be perfectly helpless; whereas, the builder has the remedy in his own hands. He is not compelled to build beyond or contrary to the specifications on any order of the architect unless it be written; indeed, his duty is just the contrary. He knows that the building owner relies on this safeguard; and, if he have it in his mind to make the building owner pay, he acts very wrongly—in some cases it might amount to dishonesty—to that building owner by building without a written order, because in so doing he actively enables and assists the architect to neglect his duty to his employer. The very means the building owner takes to protect himself would be used as machinery to punish him. If there were no architect, the building owner would supervise the work himself as sharply as he could. Having an architect, he does not himself supervise the work. Is he to be heavily mulcted because the architect agrees with the builder to ignore the contract? The builder knows as well as the architect what are and what are not extras, because they are both skilled. The building owner, as a rule, does not know because he is not skilled. Why should the building owner be made liable beyond the contract, when he has not been guilty of fraud or collusion, because the architect and the builder have set their heads together to get rid of the contract? In my opinion it is the plain duty of the builder to refuse to do extras without the architect's written order; and, not having obtained it,

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he cannot, in the absence of a final certificate enumerating the extras ordered, or covering the amount in words, make the building owner liable. I do not take the same view as my learned colleague, Mr. Justice Bundey, with regard to the case of *Pashby* v. *The Mayor of Birmingham* (18 C.B., 2). By the contract in the case now before the Court two things are required before the builder can recover—1. A certificate of completion. 2. A certificate for payment clearly covering the extras. The second requirement is wholly wanting. We have no certificate for payment clearly covering them. In the case of *Pashby* v. *Mayor of Birmingham* also two things are required—1. A certificate of completion. 2. An entry of the extras in a book. There both these requirements were forthcoming. Neither was wanting. In short, the entry in the book in that case was by the terms and construction of the contract equivalent to the certificate for payment here. Therefore, I think that that case, where both material requirements were forthcoming, can not be an authority with regard to this case, where one of the material requirements is wanting. Inasmuch as there must be a new trial for excess of jurisdiction, as I have above indicated, I am relieved from what otherwise might have been the necessity of going through the learned Stipendiary Magistrate's reasons for finding wholly adversely to the architect, and I simply remark that I am not indisposed to take a different view. There were matters of dispute between the parties upon which people might fairly differ; and, although I might not take quite the same view as the architect—I can not say that I do not, I will not say that I do—yet it by no means follows that I should be authorised to treat him as unfair and oppressively biassed. My learned colleague, the Chief Justice, desires me to intimate that he concurs in the foregoing judgment; there will therefore be a rule absolute for a new trial, with costs.

In the Supreme Court.—In Banco.

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November 20.

Principal and Agent—Instructions to Agent contained in letters and telegrams—Ambiguity.

K., by letter, instructed R. to sell the lease of a publichouse for £450 over and above the amount of a mortgage held by R. R. subsequently telegraphed asking if K. would sell for £400 lump sum. K. replied in the affirmative. R., having sold for £400 only, deducted the amount of his mortgage out of that sum on the ground that K.'s instructions were ambiguous. K. sought to make R. liable for breach of his duty as an agent. R. claimed to be relieved liability on the grounds that his instructions were ambiguous, and that he carried them out as he honestly understood them.

Held, that in the instructions comprised in the correspondence and telegrams there was no ambiguity, and that R. was liable for mistaking his clear instructions.

Appeal from Local Court, Adelaide.—On the 4th April, 1883, the Defendant sold to the Plaintiff the lease of the Northbrook Hotel, Stockport, and the furniture and effects therein, for the sum of £800, of which the sum of £400 was paid in cash, and the balance was secured by a bill of sale, in respect of which the sum of £350 was owing at the beginning of the year 1885. At this time the Plaintiff was desirous of selling out, and he communicated with the Defendant, asking if he could find a purchaser. On the 8th or 10th March, 1885, the Defendant wrote to the Plaintiff asking what his terms were; and, in answer to this communication, the Plaintiff wrote to the Defendant a letter, which has been lost, but the following is a copy of it:—

"MESSRS. W. B. ROUNSEVELL & Co.

"I am in receipt of your letter requesting particulars as to the disposal of the Stockport Hotel. I want £450 for my interest in the house. Your lien of £350 the incoming tenant will have to take on the same terms that I had them, namely, £9 per cent. per annum."

The Defendant and his managing clerk, who always attended to matters of this kind, said that they had never seen any such letter. On the 23rd March, 1885, the Defendant wrote to the Plaintiff as follows:—

"23rd March, 1885.

"Yours to hand re sale of Stockport Hotel. The person who was applying for particulars called this evening, and I told him, after he had offered £400, that the lowest amount you were prepared to take was £450. He is therefore going to consider the matter, but we are rather inclined to believe that he will not give £450; however, we shall abide by your memo."

On the 29th March the Plaintiff wrote to the Defendant a letter, which contains the following paragraph:—"I enclose to you my terms for the house, £425, so you will see I have come down £25.

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But I have not heard from you since. Perhaps you will be kind enough to let me know if you have had any communications with the party since." Subsequently the Defendant telegraphed to the Plaintiff asking—"Will you take £400 lump sum? Reply at once." And the Plaintiff replied—"Will accept £400, as per telegram."

The Defendant thereupon entered into a contract with one O'Reilly for sale of the hotel for the sum of £400.

The Plaintiff then went to Adelaide to complete the sale, and found, to his surprise, that the amount owing on the bill of sale was to be deducted from the £400, thus leaving the Plaintiff the sum of £50 only out of the purchase money, instead of the full sum of £400, as he expected.

An action was thereupon commenced by the Plaintiff in the Adelaide Local Court against the Defendant to recover the sum of £390 for damages sustained by the Plaintiff by reason of the Defendant selling the said hotel, stock, furniture, goodwill, and effects therein below the sum or limit fixed by the Plaintiff; and for that the Defendant, being the Plaintiff's agent, wrongfully sold the said hotel and premises for £400 instead of £750; and for that the Defendant, being mortgagee of the said hotel and premises, wrongfully and unlawfully sold the same for less than the full and fair value thereof; and for money received by the Defendant for the use of the Plaintiff.

At the trial the jury found a verdict for the Plaintiff for the full amount claimed.

The Stipendiary Magistrate of the Adelaide Local Court subsequently refused to grant a new trial, and the Defendant then obtained a rule *nisi* from this Court for a new trial on the following grounds:—

(1) That there was no evidence that Defendant was Plaintiff's agent.

(2) That there was no evidence that Defendant sold below the price fixed by Plaintiff, or that the Defendant wrongfully sold.

(3) That the evidence shewed that the Plaintiff authorised the Defendant to sell at the price obtained, or that the Plaintiff was estopped from denying that he authorised the Defendant to do what he did.

Symon, Q.C., moved for a rule absolute.

H. E. Downer for Plaintiff — Defendant was mortgagee of the previous tenant of the publichouse. The Plaintiff purchased

the premises about two years before the sale complained of, through the Defendant, for the sum of £800. The questions put to the jury were based on the fact as to whether the Defendant had received the letter giving the Defendant instructions to sell. At the time of the sale the premises were mortgaged to Defendant for the sum of £350. The letter giving instructions to sell stated the terms at £450 above the mortgage. The Defendant ultimately sold for £400, being £50 above the amount of the mortgage. There was evidence that the Defendant had received the lost letter.

[*Symon, Q.C.*, waived the first point on which he had obtained the rule *nisi*.]

It is immaterial when the terms of sale were given by the Plaintiff to the Defendant.

[WAY, C.J.—It is admitted that there was a letter written by Plaintiff to Defendant; the Plaintiff says the letter stated the terms. Defendant admitted that there was a letter, but denied that the terms were stated. This was therefore a question for the jury.]

Would Defendant have sold for £50 if Plaintiff had said that sum was what he required? Would he not have sold for £50 over the mortgage?

The jury found for the Plaintiff. The question of the weight of evidence was for them. If a mortgagor were negotiating with a mortgagee for a sale of the mortgaged property, the negotiation would be for the sale of the mortgagor's, not the mortgagee's, interest.

Symon, Q.C., in reply—The question is whether the instructions to sell were as Plaintiff states them, whether as Defendant states them, or whether they were doubtful. There was an ambiguity in the correspondence. Were the instructions so plain that the Defendant could not honestly have blundered? It was not necessary to enquire what the Plaintiff meant. If the correspondence could have been construed in the way Defendant construed it, the Plaintiff cannot recover—*Leake* (479), citing *Ireland* v. *Livingston* (L.R. 5, H.L. 416), *Boden* v. *French* (10 C.B., 886), *United Insurance Company* v. *Cotton* (18, S.A.L.R.) The Defendant acted *bona fide*. The Plaintiff must make out his own construction where the matter is at all doubtful. Taking the evidence as a whole, Defendant might put the construction on the correspondence which he did.

WAY, C.J., in delivering the judgment of the Court, said— In this case the Defendant sought to have a nonsuit entered on the

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ground that on the evidence he should not have been held liable for any breach of his principal's instructions. The law as laid down by Mr. Symon was undoubtedly correct, namely, that all an agent had to do in the performance of his duty was to exercise reasonable care and intelligence in carrying out the agency entrusted to him, and if the instructions which he received were ambiguous in their inception or became ambiguous by any subsequent correspondence or acts on the part of the principal, then the agent was not liable if in the exercise of his authority he did not carry out what the principal intended. That was the view taken by the Court in the case of the *United Insurance Co.* v. *Cotton*, and which had been upheld by the Privy Council. In the present case there could not be a reasonable suggestion of *mala fides* so far as the Defendant was concerned. The Defendant had received instructions from his principal, and there was nothing to suggest that he had anything to gain by selling the property at the price at which he understood he was authorised to sell at. It was unfortunate that the letter which the Plaintiff first wrote to the Defendant as to the terms on which he should sell the Stockport Hotel was mislaid. He said distinctly that he wanted £450 for his interest over and above a mortgage of £350 which Defendant held on the premises. In reply to this he wrote that he did not think he could get £450, but that he would abide by Plaintiff's memorandum. The Plaintiff then wrote that he would take £425, and added, "You will see I have come down £25." According to the Defendant's construction it must be assumed that the Plaintiff had come down £375. Then the Defendant telegraphed "Will you take £400 lump sum?" Now, Mr. Symon had argued that this must be taken to be a new departure. That contention was answered by the fact that if the telegram was taken by itself it was unintelligible, and it must be interpreted by the previous correspondence. The Plaintiff assented to the £400, and the Defendant, who had mislaid the letter containing the original instructions, completed the purchase for £400 instead of £400 plus the £350 mortgage. It therefore appeared to himself and his learned colleague that the Defendant was liable for the damage sustained by his principal. They were of opinion that there was ample evidence for the jury's consideration, and that the verdict must stand. The rule to enter a nonsuit for the Defendant would be discharged, and the original verdict would stand.

In the Supreme Court.—In Banco.

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WAY, C.J., and BOUCAUT and BUNDEY, JJ.

BEAUMONT AND OTHERS *v.* SOWTER AND OTHERS.

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Will—Construction—Life interest—Direction void for uncertainty—Rule against perpetuities.

A testator directed that his wife and his six children, named in his will, should each be paid one-tenth part of the net rents of his real estate; and, upon the decease of his wife, and also upon the decease of any of his children without issue, her or his share or proportion in the said net rents should be equally divided between the remaining children; but, should any of his sons or daughters die, leaving one or more children, then the share or proportion which he or she (his said son or daughter) so dying was entitled to under his will should be equally divided between the survivor or survivors of them, their children or child; and, if but one, the whole share or proportion to be in trust for such one child absolutely. He further directed that the balance, or remaining three-tenths of the net proceeds of the said rents, should be applied and expended in the erection of one or more houses upon certain land of his in Adelaide until the whole should have been built upon, the rents and profits arising from such buildings, as also the three-tenths of the rents theretofore reserved, to be paid to his wife and them, his said children then living, in like proportions and like manner as theretofore mentioned.

At the time of this action the wife and all the children of the testator were living.

Held, that the direction to build was void for uncertainty, because there was no direction as to the character of the houses to be built, and as being contrary to the law against perpetuities.

Held, further, that the wife and six children took a life interest in seven-tenths of the property between them, and that, upon the death of the widow or of any of his children, their life interest was to go to the survivors if they left no issue; but, leaving issue, was to go to such issue, subject to a gift over in remainder to the grandchildren of the testator.

Held, also, that, having regard to the whole terms of the will, the same persons took a similar interest in the remaining three-tenths of the testator's property.

Further consideration.—William Sowter, late of King William-street, Adelaide, storekeeper, deceased, made his will, dated the 21st day of January, 1873, whereby he, *inter alia*, gave and bequeathed all his real estate, and also all his leasehold estate, with the appurtenances of which he was possessed or to which he might be entitled at the time of his decease, unto his wife, Mary Ann Sowter, and his friends, Mr. William Webb, of Adelaide, printer, and Mr. Thomas Webb, also of Adelaide, storekeeper, their heirs, executors, administrators, and assigns, according to the nature and tenure thereof respectively, upon and for the trusts, intents, and purposes thereinafter expressed and declared of and concerning the same, that is to say—Upon trust that they, the said trustees and the survivor or survivors of them, and the executors or administrators of her or his assigns, should demise or let the same either from year to year, or any number of years not exceeding seven years from the making thereof, for the best and most

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improved rent that could be reasonably had or gotten for the same, and without taking any fine or foregift, or other matter or thing in the nature of a fine or foregift, so that as lessee or lessees to whom such lease or leases should be made by any clause or words therein contained freed from impeachment of waste, and subject to any such letting, demising, or leasing as aforesaid, the testator directed his said trustees, from and out of the net rents, issues, profits, and income (after paying interest, repairs, and all necessary outgoings connected therewith of his said real estate and his said leasehold estate) to pay to his said wife, also to his sons, Charles Selwyn Sowter and William Selwyn Sowter, and to his daughter, Harriet Sowter (free and clear from the control or debts of any husband with whom she might marry), each one-tenth part of the said net rents, issues, profits, and income; also, to his daughters, Alice Kate Sowter and Ellen Sowter (free and clear from the control or debts of any husband with whom they might marry), and to his son, George Henry Sowter, he directed his said trustees, out of the aforesaid net rents, issues, profits, and income, to pay to his said wife, as guardian of his three last-mentioned children, for their maintenance and education until they should each attain the age of twenty-one years, an equal proportion as she his said wife and his said sons, Charles Selwyn and William Selwyn, and his daughter, Harriet Sowter, receive—namely, one-tenth each of the said net rents, issues, profits, and income; and, on their respectively attaining the age of twenty-one years, they should then each be entitled to receive their own share or proportion of one-tenth of the said rents, issues, profits, and income as was received by his wife (as the guardian) during their minority. And he further directed that at the decease of his said wife, or upon either of his said sons or daughters, and leaving no lawfully-begotten child or children, then the said share or proportion of the said net rents, issues, profits, and income which she, his said wife, or he or she, his said son or daughter as aforesaid, was entitled to should be equally divided between the remaining survivors or survivor of them, his children; but, should either of his said sons or daughters die, leaving one or more children or child, then the share or proportion only which he or she, his said son or daughter, so dying was entitled to under that, his will, should be equally divided between the survivors or survivor of them, their children or child; and, if but one, the whole share or proportion to be in trust for such one child absolutely. And he further directed his said trustees to pay his said wife and to his said sons or daughters (or at their decease),

their children or child, their respective shares or proportion at periods not greater than three months, and the balance or remaining three-tenths of the net proceeds of the said rents, issues, profits, and income to be applied to the paying off of or part paying off of one or other of the existing mortgages; or when they, the mortgages, were all paid and satisfied, then the said three-tenths or surplus and the said net rents, issues, profits, and income should be applied and expended in the erection of one or more houses upon the land now or then lying vacant in King William-street or Carrington-street, until the whole of the acre No. 485 should have been built upon, the rents and profits arising from such buildings, as also the three-tenths of the net rents, issues, profits, and income theretofore reserved should be paid to his said wife and them, his said children then living, in like proportion and like manner as theretofore mentioned.

This was an action brought by those beneficially interested under the will against the executors for—(1) The usual administration decree; (2) a declaration of the Court as to what was the true construction of the said will, and what interests the various persons took under the will. At the trial, on the 18th of August, 1885, the usual administration order was granted by consent, and the question of the construction of the will was adjourned for further consideration. The widow and all the children of the testator were alive and represented at the hearing.

The case now came on for further consideration. The question of the time when the *corpus* should be distributed was left open.

Symon, Q.C., and *W. J. Belt* for the Plaintiffs, three of the children of the testator beneficially interested under the will—The widow and children have the whole estate in the seven-tenths of the testator's property. The grandchildren only take the interest of their parents in the event of such parents dying. The rents of the buildings which the testator directed to be erected having been given to the wife and children then living, that is, living at the time of the completion of the erections, would also seem to favor the construction that the testator intended to give the land absolutely to his wife and children. They have also the whole estate in the remaining three-tenths. The direction to build is void for uncertainty. The testator has provided no method or means in which the buildings are to be carried out—*Curtis* v. *Lukin* (5 Beav., 147). It was also against the law of perpetuities—Theobald on Wills (287). As the property was producing no income, and there were certain outgoings

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in connection with it each year, we ask for an order for sale under the Settled Estates Act, 1880.

Mann, Q.C. (*Crown Solicitor*), for the grandchildren—Upon the true construction of the whole will, the widow and children take a life interest in the property in equal shares with remainder to the grandchildren. As to the seven-tenths the children only take a life interest under s. 28 of the Wills Act, 1842, as a contrary intention appears in the will, and the three-tenths is disposed of by the testator in a similar manner.

E. J. Cox for the Defendants, three of the children of the testator beneficially interested under the will, submitted to any order the Court might make.

C. C. Kingston for the trustees of the will, also submitted.

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WAY, C.J., in delivering the judgment of the Court, said—This case has come before us for further consideration, and for the confirmation of the Master's certificate, on which no question arises, except that the children, who have a life interest in a portion of the property, with a very laudable regard for the interests of their mother, who is also a beneficiary, have consented that half their yearly interest shall go to the mother until her income amounts to £200 a year. That consent does not bind the grandchildren, and the order will have to be limited accordingly. The testator gave his property, the real estate, in this way: Having six children he gave seven-tenths of the income between his wife and his children in equal shares, and in the event of the wife or any of the children dying the balance of the seven-tenths was to go to the survivors, subject to a further provision, that in the event of any of the children dying and leaving issue, the share of the income of the child so dying was to go to his or her issue. There appears to be no reasonable doubt as to the meaning of that part of the will. The widow and children take a life interest, subject to the gift over in remainder of the *corpus* to the grandchildren. The real point to be argued was as to the construction of the will in regard to the remaining three-tenths of the income of the property. It was directed as to the three-tenths, first, that it was to be applied to pay off encumbrances on the property. That has happened, therefore no question arises as to that direction, which was a perfectly lawful and clear direction. But then the testator having an acre of land at the corner of Carrington and King William streets, directed that when the encumbrances were paid off the three-tenths surplus of the income should be devoted to

building on this acre until the whole of it was covered. As was pointed out by Mr. Symon that direction was void—first, for uncertainty, because there was no direction as to the character of the houses to be built; and secondly, also as being contrary to the rule against perpetuities. Therefore we may look on that clause of the will as swept out of it, and we have to construe the will as if that direction was not contained in it. Then arises the question as to whether the children and the widow take an absolute interest in the remaining three-tenths of the income, or if there is a remainder over to the grandchildren. If we take the language of that clause of the will literally it is simply a gift to the widow and children. But we are bound to look at the whole of the instrument in construing the will; and when we first ascertain the *status quo* and then apply this language to it, we really have not to insert any additional words in the will for the purpose of construing it. This clause directs that "the three-tenths of the net rents, issues, profits, and income shall be "paid to my said wife, and they my said children then living, in like "proportions and like manner as heretofore mentioned." The mortgages have been paid off, the widow and all the children are living, therefore at the present moment no question arises as to which of the hands are entitled to receive the money. But by-and-bye the widow will die, and some of the children will die. In what manner then is this three-tenths of the income to be disposed of? The will says it is to be paid to my wife and children then living "in like "proportions and in like manner as heretofore directed." The clause means that while the widow and children are living they are to receive it in equal shares, and when any die the balance is to go to the survivors, except that if any of the children leave issue, the share of the child so dying is to go to the issue. It seems to us that the plain meaning of the testator was that beside the seven-tenths, as to the three-tenths also, the widow and children should take a life interest and then there should be a gift over to the grandchildren, and there will be an order accordingly. The only remaining question is what is to be done with the property. Under the provisions of Lord Cairns' Act (which was adopted in this colony, and which seems to be altogether overlooked by many persons who are now denouncing our system of land tenure) there is a clear provision that in cases like this, where it is not profitable to the beneficiaries that the land should be retained, notwithstanding there is no power of sale, and even although a sale is forbidden in the will, the property can be

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sold. There can be no doubt that in the present case the taxes and various charges on the land are absorbing the whole of the income, and that it is better for the beneficiaries that the land should be sold, and there will be a direction accordingly. The order will be drawn up so as not to make it incumbent to sell immediately, so as not to force it on the market at a time when land is unsaleable. The costs of all parties will come out of the estate.

E. J. Cox, for the executors, applied for commission to be paid out of the real estate.

WAY, C. J.—I have again and again held that the power to grant commission to the executors by virtue of the Testamentary Causes Act, 1867, only applies to the personalty and can only be paid out of the personalty. I have always refused to direct payment out of the real estate, but in awarding commission I have considered the trouble in collecting the real estate.

The following is a copy of the order in this case, all parties consenting to the same:—*This Court doth order that the Master's certificate be confirmed, and the Plaintiffs and Defendants, by their counsel admitting that no mortgages exist or affect the said devised property, and the Court now declaring that the trusts contained in the said will directing the trustees thereof to apply three-tenths of the income of the trust estate in building upon town acre No. 485, mentioned therein, is invalid and ought not to be carried out. This Court doth further order that the testator's widow, Mary Ann Sowter, and the testator's children, Harriet Beaumont, Alice Kate Graham, Ellen South, Charles Selwyn Sowter, William Selwyn Sowter, and George Henry Sowter, according to the true construction of the testator's said will are severally entitled during their respective lives to one equal seventh share of the income of the testator's estate, with remainder (except so far as regards the said Mary Ann Sowter) to their respective children* per stirpes *and with remainder*

after the death of the said Mary Ann Sowter, so far as regards her one-seventh share or other accruing share under the testator's said will, in trust for the testator's children who shall be living at the death of the said Mary Ann Sowter, and the surviving issue of any of the testator's children who shall be then dead, such issue to take per stirpes, *but so that the testator's children who shall then be living shall take their shares during their respective lives only with remainder to their respective issues, and with remainder after the death of each of the testator's children, Harriet Beaumont, Alice Kate Graham, Ellen South, Charles Selwyn Sowter, William Selwyn Sowter, and George Henry Sowter, who shall respectively die without leaving issue surviving him or her as to the one-seventh share or other accruing share of him or her so dying without issue, in trust for such one or more of the testator's children who shall then be living and the surviving issue of any of the testator's children who shall be then dead, such issue to take* per stirpes, *but so that the children who shall then be living shall take their share during their respective lives only, with remainder to their respective issue, and the Plaintiffs and the Defendants and the several persons entitled in remainder by their counsel requesting an order for the sale of the said town acre, section No. 485, situate in the City of Adelaide, and this Court being of opinion that it is proper and consistent with a due regard for the interest of all parties entitled under the said will of the said William Sowter that a sale should be authorised of the said town acre, section No. 485, part of the settled estates devised by the said will, this Court doth order that*

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the said town acre No. 485 be sold accordingly with the approbation of a Judge, and that the money to arise by such sale be paid into Court to the credit of this action. And this Court doth further order that such sums as shall be paid into Court, after deducting all costs of and incidental to such sale, shall be invested by the Master of this Court and the interest thereof paid as directed by the trusts hereinbefore declared to be the trusts of the said will of the said William Sowter. And this Court doth further order that the Plaintiffs and the Defendants have out of the assets of the testator in the pleadings mentioned all costs, charges, and expenses of and incidental to this action, to be taxed as between solicitor and client, and that the further consideration of this action be adjourned, and all parties are to be at liberty to apply as they shall be advised.

In the Supreme Court.—In Banco.

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WAY, C.J., and BOUCAUT and BUNDEY, JJ.

HOOPER *v.* HOLDEN.

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Execution—Solicitor and client—Liability of execution creditor for wrongful seizure under Warrant of Execution—Implied authority of Solicitor—Direction by Solicitor that execution debtor had particular premises—Interpleader under Local Court Act, 1861*—Effect of Judgment—Estoppel.*

It is not within the scope of the implied authority of the solicitor for a judgment creditor issuing a warrant of execution in a Local Court to direct the bailiff that the execution debtor has particular premises, and if he do so and the bailiff execute the warrant there and the address is incorrect, the execution creditor is not responsible for any damages therefor. If the party claiming makes no claim for damages, but only claims the goods on an interpleader summons under s. 44 of the Local Court Act, 1861, and recovers judgment, he is not estopped from claiming damages in another action. *Holmes* v. *Dunstall* (2 S.A.L.R. 28) discussed.

SPECIAL Case stated by Mr. J. M. Stuart, Stipendary Magistrate of the Local Court of Adelaide, for the consideration of the Supreme Court. The following are the material points in the special case :—

1. The Plaintiff claimed £100 for trespass to his goods, for that the Defendant by his solicitor wrongfully directed certain bailiffs to take the Plaintiff's goods in execution under a warrant of execution against the goods of one Thomas Hooper, whereby the Plaintiff's goods were seized and disposed of, and whereby the Plaintiff's business of a livery-stable keeper, then carried on by him, was injured and destroyed and the profits arising therefrom were lost to the Plaintiff, and whereby the credit of the Plaintiff in his said business and otherwise was by the premises lessened and damaged, and several of his creditors stopped his credit.

2. The Defendant appeared and said he was not guilty and that the goods and chattels were taken under color of an execution issued out of the Local Court in Adelaide in an action wherein the then Defendant was Plaintiff, and Thomas Hooper was Defendant, and the Plaintiff in this action made a claim to or in respect of the said goods and chattels, and afterwards such claim was adjudicated upon by the Local Court of Adelaide and an order made between the parties pursuant to the Local Court Act, 1861.

3. The evidence adduced on the trial in the Local Court of Adelaide shewed that the clerk of the Defendant's attorney issued execution against one Thomas Hooper in an action in such Court; the clerk of the Court wrote on the warrant by his direction the words "Stables at the back of Sir John Barleycorn." The bailiff executed the warrant there and seized certain goods and chattels; the stables in question were rented by the Defendant Thomas Hooper's brother, the Plaintiff in this action, to whom the goods and chattels seized also belonged. The question was whether the Defendant in this action was liable for the act of his attorney's clerk. The following is the material evidence taken in the Court below:—The clerk of the Adelaide Local Court stated he wrote the footnote, "The Defendant "has stables at back of Sir John Barleycorn," on the warrant of execution by direction of Mr. Harris, clerk to Messrs. Bray, Foster, and Hackett, the Defendant's solicitors. The words "stables at back "of the Sir John Barleycorn, Hooper only, Bray, F. and H., per G. D. "H., 3/7/85," written across the face of the heel of the ticket book is the writing of Mr. Harris. He wrote "Hooper only" at Mr. Harris's direction. On cross-examination he stated in every case it is customary to take the initials of the attorney or his clerk issuing the execution. He got no other direction from Mr. Harris than that on the

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ticket book, and to the Court he stated that he appended the note to the warrant of execution because he got the memorandum from the clerk on the heel of the ticket book. The assistant bailiff of the Local Court stated:—He went to the stables at the rear of the Sir John Barleycorn with the warrant as directed by the footnote written on it. He saw the Plaintiff in the present action there and told him he had an execution against him. Hooper said—"There is a mistake "somewhere, it has nothing to do with me." He then stated he could not help it, that the execution was directed to the stables, he was a Mr. Hooper, and that he would have to remain until withdrawn or paid out. He saw Defendant's solicitor and then told Hooper that the solicitor had said he was the man. He entered under the execution and seized the goods, and Hooper afterwards gave him a notice claiming them; he then removed the goods and withdrew from execution. The Plaintiff stated he was a livery-stable keeper at the time of the execution. When the bailiff came with the warrant to his place he told him it was a mistake and had nothing to do with him. The bailiff told him he was directed to go there. He went and saw Holden, the Defendant, and asked him what he meant by sending the bailiff to his place as he never had any dealings with him. Defendant referred him to one of his own clerks. The clerk told him to go to Mr. Foster, his solicitor. He went there, and told Mr. Foster he had come from Holden. He asked him—"Are you going to take the bailiff out of my place?" Mr. Foster replied—"Are you sure you are not the one?" He said—"No, I am not the one." Mr. Foster said—"I think you are." He said—"I had nothing to do with Bennett & Hooper of North "Adelaide. Do you mean to shift this man?" Mr. Foster said—"No." The next day he gave notice and the bailiff removed the goods and went out of possession. He was obliged to sell out of his business in consequence. Cross-examined — He did not know if he told Mr. Foster his name. He believed he told Mr. Foster the goods and stable belonged to him and that his brother had nothing to do with it. Mr. Foster said—"I think you are the man." He told Mr. Foster his name was Richard, and it was his brother the execution was against. His brother came to the stable while the bailiff was there. His brother lived at North Adelaide, but was often there. He had been working there a week before. He was working on commission. His brother was not always to be found there, but was there when the bailiff came, and his letters were sent there. Thomas Hooper stated:

The execution was against him. He was living at North Adelaide and had nothing to do with his brother.

4. Mr. Foster then moved for a nonsuit, which the Stipendiary Magistrate granted. The question for the opinion of the Supreme Court is, Was the nonsuit right? If otherwise the Plaintiff to have a new trial.

W. V. Smith for the Plaintiff—There was a case to go to the jury. 1st—The client is liable for the acts of his solicitor in the ordinary scope of his employment, and the solicitor so acted through his clerk in directing the footnote to be written on the warrant. *Jarmain* v. *Hooper* (13 L.J., C.P. 63, 6 Man. & G. 827). The other side may rely on *Smith* v. *Keal* (L.R. 9, Q.B.D. 340). This case expressly affirms *Jarmain* v. *Hooper*, but was decided upon an entirely different state of facts. He cited *Sowell* v. *Champion* (7 L.J., Q.B., 197), *Stratten* v. *Lawless* (14 Irish Com. Law Reps. N.S. 432). 2ndly—The judgment on the interpleader summons does not operate as an estoppel. There was no statement in the case as to there having been an interpleader cause, but he had admitted on the trial in the Local Court that an interpleader summons had been heard and judgment given for the claimant for the goods—*Holmes* v. *Dunstall* (2 S.A.L.R., 28). 3rdly—The evidence showed the ratification by the client of the subsequent acts of his solicitor. The solicitor when he refused to withdraw the bailiff and told Plaintiff he believed he was the man, assented to the acts of the bailiff and undertook to bear all the responsibility—*Stratten* v. *Lawless*, *Wilson* v. *Tumman* (6 Man & G., 242, 6 Sco., N.R. 894), *Woollen* v. *Wright* (31, L.J., Ex. 513), *Lewis* v. *Read* (13 M. & W., 834), *Walker* v. *Hunter* (2 C.B., 324), *Addison on Torts* (5 Ed. 87).

Foster for Defendant—1. The judgment recovered by the Plaintiff on the interpleader summons is *res judicata*, and acts as an estoppel. *Holmes* v. *Dunstall* (2 S.A.L.R., 28) is not law. This case was decided under s. 145 of the Local Court Act, 1861.

[WAY, C.J.—This case decided that the claimant could only recover on an interpleader summons the proceeds of any sale of goods by the bailiff paid into Court under the Act—not damages—for the wrongful seizure.]

S. 144 of the Local Court Act is of the same effect as s. 118 of the Imperial statute 9 & 10, Vict. c. 95; s. 118 was afterwards amplified by s. 31 of the Imperial statute 30 and 31, Vict. c. 142, and under the latter section special damages could be

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claimed on the interpleader issue—*Death* v. *Harrison* (L.R., 6 Ex. 15). Special damages could also be claimed under s. 118 of 9 & 10 Vic., c. 95—*Tinkler* v. *Hilder* (18 L.J. Ex. 429), *Jessop* v. *Crawley* (19 L.J., Q.B. 139.)

Smith cites *contra Pitt Lewis* (County C.P. 2nd Ed., 714), *Cater and Ano.* v. *Chignell* (15 Q.B., 217), *Mercer* v. *Stanbury* (25 L.J., Ex. 316), *Jones* v. *Williams* (4 H. & N., 706).

[BOUCAUT, J., referred to *White* v. *Mules* (12 S.A.L.R., 170).]

2. There was no active interference by the Defendant. Notwithstanding the case of *Jarmain* v. *Hooper*, the execution creditor is not liable unless he actively interferes. The action of the solicitor in giving the address was not an active interference for which the execution creditor is liable. It is merely for the information of the bailiff to act upon or not as he thinks proper. The memorandum of the clerk Harris upon the heels of the tickets did not authorise the endorsement by the clerk of the Local Court of the memorandum upon the warrant. *Childers v. Wooler* (29 L.J., Q B., 129).

3. The facts show that there was no ratification, and there can be in law no ratification of the acts of the bailiff, who is an officer of the Court, and not an agent of the Defendant—*Cronshaw* v. *Chapman* (31 L.J., Ex. 277), *Burling* v. *Harley* (27 L.J., Ex. 258), *Wilson* v. *Tumman* (6 Sco., N.R., 894), *Woollen* v. *Wright* (31 L.J., Ex. 513), *Smith* v. *Keal* (L.R. 9, Q.B.D., 340, Chitty's Forms 12 Ed., 396, note N.)

Smith, in reply cited *Haseler* v. *Lemoyne and Ano.* (5 C.B., N.S. 530), *Lewis* v. *Read and Ors.* (13 M. & W., 834), *Walker* v. *Hunter* (2 C.B., 324, Broom's Legal Max. 828), *The Queen* v. *Woodward* (31 L.J., M.C., 91), *Withers* v. *Parker and Ano.* (29 L.J., Ex. 320, Chitty's Forms, 10 Ed., 323, note A.)

November 26. BOUCAUT, J.

BOUCAUT, J., delivered the following judgment:—In this special case the first question arises on the plea of estoppel. This is ill-pleaded. It only says that there was an order made in an interpleader enquiry in respect of the seizure complained of, but does not show what order. Further, there is no evidence in support of this plea. But Mr. Smith, for the Plaintiff, admits that he made admissions in the Court below which would show that the plea was proved. Accepting this, although such admissions at the bar ought not to be necessary in a special case, I think the plea is no answer to this action, even supplemented by the admissions which Mr. Smith makes. The present claim is for special damage by reason of loss of

business in consequence of the seizure complained of. Mr. Foster admits that that special damage was not enquired into on the inter-pleader. Therefore it follows from the decision of *White* v. *Mules* (12 S.A.L.R., 170) that an enquiry in the Local Court, which did not touch that claim for special damage, wherein it was not claimed nor enquired into, and probably could not be enquired into, cannot be said to be an estoppel in respect thereof. It was argued that *Holmes* v. *Dunstall* (2 S.A.L.R., 28) prevented the present Defendant from raising this question, but I do not think that case has anything to do with it. That case only decided that the bailiff on a proper seizure was only liable for the value of the goods, and cannot decide what is the measure of damages against an execution creditor, who as is alleged here improperly interferes. The two remaining and important questions are—1. Was there an original unauthorised interference by the execution creditor, the now Defendant? 2. If not, did he so ratify the act of the bailiff as to make himself a trespasser? There is much difficulty involved in these points, and there has been a considerable difference of opinion amongst the Judges. But the full and careful arguments we have listened to—and especially the very clear argument of Mr. Foster—satisfies me that there was no interference by the execution creditor, the now Defendant. Whether or not there was "an interference" by the Defendant's solicitor or the clerk of the Local Court, so as to make them liable, is another matter, on which I pronounce no opinion. *Jarmain* v. *Hooper* (6 M. & G., 827) shows that the endorsement of the writ of *fi. fa.* with the residence of the execution debtor is an act within the scope of the duty of the attorney, which makes the client liable if the endorsement acted upon by the sheriff is wrong. In *Cronshaw* v. *Chapman* (31 L.J., Ex. 277) there was such an endorsement, and also a letter from the attorney for the execution creditor informing the sheriff that if any claim were set up by any third person the execution creditor would contest it, yet it was held that the execution creditor was not liable on the ground that the letter amounted only to a warning to the sheriff to do his duty. It seems difficult to reconcile *Cronshaw* v. *Chapman* with *Jarmain* v. *Hooper*, and indeed the question seems settled by *Smith* v. *Keal* (9 L.R. Q.B.D., 340), where the Court of Appeal expressly approve and adopt *Jarmain* v. *Hooper*, and therefore we are bound to follow that, and not *Cronshaw* v. *Chapman*. But this is not a *fi. fa.*, and that which is said to make the execution creditor here liable is not an

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endorsement according to an old and settled practice, as the endorsement on the *fi. fa.* in *Jarmain* v. *Hooper* required by law at the time of that case, but something quite different. It is a statement as to the execution debtor's residence procured from the attorney's clerk by the clerk of the Local Court, and entered by him on the pay-slip for the execution and signed by the attorney's clerk. It is a novelty and an innovation not required by the law. The duty of the clerk of the Court was to issue the execution against the person against whom judgment was recovered, who was the person named in the summons. On the issue of the execution it was the duty of the bailiff to seize that person's goods, and his only, wherever he could find them. At most the statement was information given to the clerk of the Court with the expectation that he would give it to the bailiff. Now *Smith* v. *Keal* decides that through the regular and precise endorsement of the writ of *fi. fa.* in *Jarmain* v. *Hooper* bound the execution creditor, he is not bound by all communications which may be made by his attorney to the sheriff, and although the decision in *Cronshaw* v. *Chapman* seems not to be law, the *ratio decidendi* there is precisely the same as in *Smith* v. *Keal* —that is to say, that for giving information only there is no liability. In *Cronshaw* v. *Chapman* there were, it is true, both the endorsement and the letter; but the argument turned only on the letter. No reliance seems to have been placed on the endorsement—certainly a strange oversight after *Jarmain* v. *Hooper*—and *Jarmain* v. *Hooper* was not referred to. Then there is *Childers* v. *Wooler* (29 L.J., Q.B., 129), an action against the attorney, in which it was held that the direction on the writ was only information to assist the sheriff, and was not interference; but that decision was not in opposition to *Jarmain* v. *Hooper*, because the Court in *Childers* v. *Wooler* expressly recognised that case, pointing out that the endorsement there was much more precise than the endorsement before them in *Childers* v. *Wooler*, which was partly in blank, and also pointing out that there was a ratification in *Jarmain* v. *Hooper* of the attorney's acts. However, I observe on this that the judgment delivered in *Jarmain* v. *Hooper* does not rely on any ratification, and during the argument the Court seemed to take the other view. These cases therefore seem to decide—1. That under the old rules, where there was a precise endorsement on a *fi. fa.* by an attorney in the regular way, as in *Jarmain* v. *Hooper*, the client is liable if it be wrong and be acted upon, as such an endorsement was within the scope of the attorney's duty. 2. That where it is not precise, as in *Childers* v. *Wooler*, the

client is not to be liable. 3. That for information not such as is within the ordinary and necessary scope of an attorney's duty, such as the letter in *Cronshaw* v. *Chapman*, and the verbal communication in *Smith* v. *Keal*, the client is not liable. Mr. Smith argued that the memo. made here by the clerk of the Court on the pay-slip and on the warrant of execution, was in all respects analogous to the endorsement on a writ of *fi. fa.* by the attorney. But what I have above said shows that, in my opinion, this contention cannot be maintained. The endorsement in *Jarmain* v. *Hooper* was usual and required by law and long practice. This is not required by law nor by such long practice. The information given through the clerk of the Court here is much more analogous to that given by the letter in *Cronshaw* v. *Chapman*, and by the words in *Smith* v. *Keal*, and amounts only to information to the bailiff, which is to be useful to him or not in doing his duty, as he may decide, but by no means amounts to any interference by the execution creditor. I am further fortified in this conclusion by the words of the Master of the Rolls (Sir G. Jessel) in *Smith* v. *Keal*:—"I agree that the Court ought to "be very careful how it extends the doctrine *respondeat superior*. "It has been carried in our law very far indeed. I think quite far "enough. If I had to enact a law upon the subject I doubt whether "I should carry it so far. What we have to find out is what is the "extent of the authority of a solicitor who is employed by a Plaintiff "in an action. Now it is clear that it is no part of his duty to "interfere with the sheriff in the performance of his duty. It is the "sheriff's duty to levy execution on the goods of the judgment "debtor. If, therefore, the solicitor interferes and directs the sheriff "to levy on the goods of another person he is answerable on the same "principle as any one else who directs a trespass. Though "the sheriff is an officer of the law he is liable if he commits "a trespass, and any one who joins in the trespass is equally liable. "But why should it be assumed that it is within the scope of the "solicitor's duty to give verbal directions to the sheriff as to the "proper execution of his writ? It is not the province of the solicitor "to interfere with the sheriff. The sheriff must ascertain for himself "whether the goods he seizes are the judgment debtor's goods." Applying those words to this case, "It is not to be assumed that it is within the scope of the attorney's duty" to make endorsements on the books and warrants of the Local Court. In one sense it may be said to be within the scope of the attorney's duty to give information

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to the sheriff or the bailiff, and so it is. But information given in this sense is, as said in *Childers* v. *Wooler*, only information to assist the sheriff in deciding what he is to do, and not mandatory to bind him to do an act such as to make the execution creditor liable. Then it is said that there is a ratification by the execution creditor. Now *Wilson* v. *Tumman* (6 Sco. N.R., 894, 6 Man. & G. 242) was a stronger case of ratification, if ratification there could be, than the evidence shows here. All that the execution creditor's attorney does here is to disclaim interference. There interference was practically acknowledged and justified. Yet it was held that there could be no ratification in such a matter, because the officer levying was the servant and agent of the law, and not the servant or agent of the execution creditor; and this view of the law was upheld by *Woollen* v. *Wright* (31 L.J., Ex. 513), where Martin, B., who had at first decided the other way, altered his opinion upon being referred to *Wilson* v. *Tumman*. The cases of *Haseler* v. *Lemoyne and Ors.* (5 C.B., N.S., 530), and *Lewis* v. *Read* (13 M. & G., 83), referred to by Mr. Smith, are really no authorities here, because they were cases of seizure by the parties' brokers, who are undoubtedly agents of the party, and not by bailiffs, who are not agents of the party, but officers of the law. The opinion above expressed renders it unnecessary for me to investigate *Cater* v. *Chignell* (15 Q.B., 217), *Mercer* v. *Stanbury* (25 L.J., Ex. 316), *Tinkler* v. *Hilder* (18 L.J., Ex. 429), and the other cases of that class referred to, depending upon the question as to what is within the jurisdiction of the Local Court upon the hearing of the interpleader, for it would only have become necessary to consider their effect in case I should have come to the conclusion that the execution creditor here had interfered with the bailiff in the levy of the execution. Although I cannot say that I agree with the decision as set out in the very lengthy case here sent up, and although I in part differ therefrom, yet I think that the substance of the decision was right, and that therefore the nonsuit must be upheld and the appeal dismissed with costs. I wish to add that I have no doubt that the learned Stipendiary Magistrate stated the case in the manner in which it appears with the view of assisting us. Although it has here occasioned us no inconvenience, yet if frequently followed it might cause inconvenience to a great extent, and I hope in future cases the old plan of stating them will be adhered to. The case referred to by Mr. Smith this morning caused me to make one or two little alterations in this judgment, and to

mention that the case of the *Queen* v. *Woodward* first referred to by him does not touch this case. That is a case of ratification of the acts of the agent of the party, and not a case of ratification of the acts of an agent of the law. This I have already fully dealt with. As to the second case of *Withers* v. *Parker*, I find on looking at the full facts that it does not touch this case. It was not a case of ratification at all, but a question of fact as to the withdrawal of the execution, and the whole matter as stated by the learned Baron in that case was as to whether the clerk had countermanded the requisition to the sheriff so as to nullify it altogether, and leave the parties in their original position. Therefore that case does not touch the matter before the Court. I have said that I had to make one or two alterations in this written judgment, these alterations having been required by Mr. Smith's references to Archibald's Practice referring to the case of *Jarmain* v. *Hooper*, which so far from assisting Mr. Smith is a strong authority in favor of Mr. Foster. The distinction, as I have pointed out in the case now before the Court and *Jarmain* v. *Hooper*, is that the endorsement was then required by law, whilst in this case there was no such requirement. The endorsement in *Jarmain* v. *Hooper* in the form in which it was made is no longer necessary and required by the law. In this case, although the endorsement might be permissible, is was not required by law, and was simply information upon which the bailiff might or might not act, and was not equivalent to a mandatory endorsement.

BOUCAUT, J.

WAY, C.J.—I concur with the judgment just delivered by my learned colleague, Mr. Justice Boucaut, and the reasons therein stated. With respect to the form of the special case, it was undoubtedly desirable, and the learned Special Magistrate has communicated with me and desired me to intimate his concurrence with the view that the points of law which were reserved should have been succinctly stated apart from the argumentative matter. At the same time I do not wish to discourage the Special Magistrate from stating the reasons which lead him to a particular conclusion. I desire to say that I, as well as my learned colleagues, have been much assisted by the elucidation of the cases given by the Special Magistrate, but it would have been better, however, had they been contained in a separate judgment, and not as part of the formal special case. I do not agree with the learned Special Magistrate that *Holmes* v. *Dunstall* decided that this action was not maintainable. He has mistaken the effect of the judgment, which merely decides

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that where goods had been sold under an execution, in which the execution creditor had not actively interfered, all the claimant could recover was the proceeds of the goods, and not their value. It did not touch the question of the liability of the execution creditor when he actively interfered. I desire to add, as has been mentioned by my learned colleague, that the distinction between the practice when *Jarmain* v. *Hooper* was decided and the present practice is clearly pointed out in the note to Chitty's Forms, which was cited by Mr. Smith and Mr. Foster, and that the analogy between the memorandum which was taken by the clerk of the Local Court and the endorsement on the *fi. fa.* of the address of the Defendant was much closer than I thought it was during the argument, and the Court was therefore indebted to both learned counsel for calling attention to the fact, as it made that part of the judgment which has just been delivered all the more clear and conclusive. I do not wish, and I do not think my learned colleagues desire, to make any animadversions on the practice which obtains in the Local Court. I understand that if a judgment creditor wished to issue an execution and no more, he pays his fees and the execution is issued. But if he desires to give additional information for the guidance of the bailiff, the clerk of the Court takes a memorandum of it—it might be a separate memorandum, but the practice is to take it in a book that is not liable to be mislaid, and to require such memorandum to be initialled by the party issuing the execution.

BUNDEY, J.

BUNDEY, J.—During the course of the clear argument advanced in this case by both the learned counsel, I was strongly against Mr. Foster upon one point, but it is not necessary to refer to it now, because I feel precluded by the case of *Smith* v. *Keal* (9 Q.B.D., 340). Were I not so precluded I should feel disposed to hold that this was an act of the attorney in the case, for which an action would be maintainable, assuming that there was ratification. It is not, however, necessary to go into that question now, because I reluctantly think myself bound by the case I have just referred to, inasmuch as such act was beyond the scope of the attorney's authority—that was, the directing this execution to be executed in a way and at the place it was executed. This is undoubtedly a very difficult case, and it almost seems, as far as one's feelings of justice are concerned, as though it should be determined the other way, because, as pointed out by Mr. Smith, the attorney might be a man of straw, and the results to

the party whose goods were seized might be most disastrous. In the case of *Smith* v. *Keal* Mr. Justice Manisty, in the course of his judgment said:—"I entirely concur in this expression "of the desire to confine the liability to the actual wrong-doer. As a "matter of principle I should say that a solicitor has no right without "express authority to impose on his client a responsibility that the "law casts on the sheriff." Now Mr. Justice Stephens says:—"It "seems to me that there are two points involved. First, whether the "client is in this case liable for the act of his solicitor; secondly, "whether the solicitor, or the solicitor's clerk, for I think there is no "distinction between them for this purpose, did in point of fact "direct the sheriff to take these goods . . . The question is whether "it was within the scope of the duty of the solicitor to point out to "the sheriff the goods which he was to seize under the writ of "execution. It seems to me that when a man puts his cause into the "hands of a solicitor he authorises the solicitor generally to act for "him in the conduct of the cause, and to take all the necessary steps "incidental thereto. The solicitor seems to me to be just one of "those agents for whom the employer ought to be liable when he "makes a mistake in the performance of any of the acts incidental to "his duty." At the bottom of the page he says:—"An illustration "that occurs to me is this. Suppose the solicitor had reason to "believe and did believe that there were certain goods, the property "of the execution debtor, available for the purposes of execution, and "the goods in question did belong to the execution debtor, but the "solicitor from fear of incurring any responsibility abstained from "pointing out these goods to the sheriff, and thereby the debt was "unsatisfied, I am not sure that the solicitor might not be liable to "his client for negligence." Lower down he adds:—"The words used "by the managing clerk might under special circumstances have "amounted to such a direction, but there was no evidence of any such "circumstances." I think there was a special direction in this case. In order to show the difficulty there is in deciding cases of this description I will contrast the decisions of two of the Judges who tried the case just cited from, with that of the other Judge, Baron Pollock, who said:—"Suppose the managing clerk of the solicitor had "done what it seems to me it would be most prudent to do, and had "said to the sheriff: 'It is your business and not mine to ascertain "what goods are available for seizure under the execution, and I shall "not advise you upon the matter at all,' and at that very moment the

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"clerk had certain information that there were goods that might be "seized belonging to the execution debtor, would an action lie at the "suit of the client against the solicitor for negligence in not giving "information to the sheriff of these goods? I should say, clearly

BUNDEY, J. "not. I never heard of such an action, and I should say to hold "such an action maintainable would be very dangerous, as tend- "ing to promote the intermeddling of a solicitor with a "function that the law casts on the sheriff. Again, suppose the "sheriff's officer in the present case had asked the managing clerk "before he could seize the goods for an indemnity in the name of the "client and the clerk had given one. It seems to me that such an "indemnity would have been worthless." Thus it would be seen that two Judges said an action would lie against the attorney, and the third that it would not. In reference to the action of the clerk of the Local Court I think it was the act of a careful officer. The attorney, in the discharge of his duty, finding that one of these parties had no means whereon execution could be levied, directed his clerk to go to the clerk of the Local Court to point out to him that the execution was to be issued only against one person, and that he was to go to a specified place to levy it. His strict technical duty was only to take the fees and deliver the execution, but in order to prevent any misapprehension in the future he put the instructions in writing, and they were afterwards initialled by Mr. Foster's clerk. In my opinion the clerk of the Court acted carefully in the discharge of his duty, and to hold that that would be an irregularity would be to cramp the efforts of officers in that position. As I consider myself bound to hold that the attorney has exceeded his authority, and thus freed his client from liability in this action, it is unnecessary to express any opinion upon the other points.

BOUCAUT, J. BOUCAUT J.—I do not exactly adopt the views of my colleague; but the Chief Justice has correctly interpreted my opinion with reference to the clerk of the Court. If he acted with a view of giving information which was tendered him by the clerk of the execution creditor he was not censurable.

Question answered in the affirmative that the nonsuit was right. Defendant granted twenty guineas costs.

In the Supreme Court.

WAY, C.J.

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November 27.

REYNOLDS *v.* REYNOLDS.

Will—Construction—Ambiguity—Omission—Implication.

A testator, after certain specific devises and bequests, directed his trustees to sell the other portion of his real estate when a fair and reasonable price could be obtained for the same, and directed the proceeds to be divided between his three children, or in the event of the death of either then for the benefit of his or her children (if any), if none, then to his surviving children; and proceeded as follows: "A further sum of £52 (fifty-two pounds) a year shall be placed to my wife's credit "or kept invested in case of sickness or any other emergency, when it is necessary to "use it at the option of my executors; and at her death or marriage the amount so "accumulated to be divided equally between her two children, Amelia and Joseph "Matthews. And to secure the carrying out of my bequests to the persons before "mentioned, all moneys I have invested on mortgage or other securities, together "with all moneys to my credit at the Savings or other Banks, together with all debts "recoverable due to me shall be invested on mortgage or other secure and profitable "investment; also the shares I hold in the National and Adelaide Banks; also all "profits derived from land and household property, until sold, to be invested with "other moneys until as each grandchild becomes of age, his or her share at the time "shall be paid with an admonition as to its careful and profitable use, seeing that it "cost their grandfather a lifetime of toil and care. The annual interest or profit on "the whole of the mortgaged or secured amounts to be used first in paying the "bequests before mentioned, and any necessary expenses incurred; and the remainder "to be equally divided between my three children, or in the event of death of either, "then in manner before mentioned."

***Held*, under the devises and bequests hereinbefore set forth that—1. The children take the proceeds of sale of the real estate not otherwise specifically devised. 2. The profits of the real estate go until sale into the general personalty to be invested. 3. The children and their issue, *per stirpes*, take the income of the general fund, subject to the specific bequest, and that the grandchildren living at the time of the testator's death take the *corpus* by implication in equal shares *per capita*. 4. The unexpended portion of the second £52 a year disposable for the widow's benefit at the discretion of the trustees and the accumulation of interest thereon go to the step-children.**

HENRY REYNOLDS, by his will dated November 8th, 1878, in the first place directed his lawful debts, funeral and testamentary expenses to be paid, and he disposed of the whole of his property, both real and personal in the following manner:—"First, to my wife, Phœbe Rey-"nolds, I bequeath during her lifetime or so long as she shall remain "unmarried the whole of my household furniture or such portion as "she may require, the remainder (if any) to be divided equally "between my three children. Also, she shall have the use of my "present residence together with four allotments of land free of rent. "In the event of her wishing to return to England or to live some-"where else, she shall have the rent or profit derivable from the same, "the property to be kept in a tenantable state of repair during her "occupancy of the same out of my estate, subject to the former

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"proviso. Also, a sufficient sum of money shall be kept "invested on mortgage or some other safe investment so that "she shall be paid the sum of £52 (fifty-two pounds) a year "in equal quarterly payments or in such other way as shall seem best "to my executors, and in the event of her wishing to return to "England her passage money shall be paid out of my estate, in which "case the household furniture and effects (excepting such small "articles as she may desire to take with her) shall then be equally "divided between my three children. Also, the sum of £20 (twenty "pounds) which I hold belonging to my wife shall be paid her. To "my son Henry Reynolds I devise and bequeath the house and "quarter acre of land, portion of town acre 535, Sturt-street, "Adelaide; also, the front portion of acre 535, measuring 52 feet 6 "inches in Sturt-street, by a depth of 105 feet, together with a use of "right-of-way at back across portion of acre 534, of not less than 12 "feet wide into Sultran-place. To my daughter Jane (Mrs. "Richardson) I devise and bequeath the two houses and land at the "corner of Norman and Sturt streets, portion of acre No. 532, city "of Adelaide. To my daughter Elizabeth (Mrs. T. Macklin) I "devise and bequeath the half acre of land being portion of town "acres No. 534 and 535, excepting such portion as I have given to my "son, together with all the buildings thereon during her lifetime, and "at her death for the benefit of her children. To my brother, "William Peter Reynolds, I devise and bequeath the whole of my "interest in portion of town acre No. 546, Sturt-street, Adelaide, "and also during his lifetime the sum of £50 (fifty pounds) a year to "be paid to him out of interest or profit of a sum of money here- "after mentioned for it and other purposes. To Mr. John Hill, "farmer, Arkaba (husband of my niece, late Annie Shute), I devise "and bequeath the whole of my interest in land selection hundred of "Arkaba, county Hanson, section 99, upon the payment by the said "John Hill to my executors of all moneys paid by me to the Govern- "ment, together with interest on same of eight per centum per annum. "The other portion of my real estate, consisting of property as under: "houses and land, Elizabeth-street, Adelaide; land, Lower Mitcham; "two sections of land near Woodside; one section near McLaren Vale; "and after the death or marriage of my widow my present residence "and land at New Brighton and any other property I may be "possessed of at the time of my death, shall be sold when a fair and "reasonable price can be obtained for the same; the proceeds to be

"equally divided between my three children, or in the event of the "death of either, then for the benefit of his or her children (if any), if "none then to my surviving children; a further sum of £52 (fifty-"two pounds) shall be placed to my wife's credit or kept invested in "case of sickness, or any other emergency when it is necessary to use "it at the option of my executors, and at her death or marriage the "amount so accumulated to be divided equally between her two "children Amelia and Joseph Matthews. And to secure the carrying "out of my bequests to the person before mentioned, all moneys I "have invested on mortgage or other securities, together with all "moneys to my credit at Savings Bank or other banks, together with "all debts recoverable due to me, shall be invested on mortgage or "other secure and profitable investment. Also the shares I hold in "the National and Adelaide Banks. Also all profits derived from "land and household property until sold, to be invested with other "moneys until as each grandchild becomes of age his or her share at "the time shall be paid with an admonition as to its careful and "profitable use, seeing that it cost their grandfather a lifetime of toil "and care. The annual interest or profit on the whole of the mortgage "or secured amounts to be used first in paying the bequests before-"mentioned and any necessary expenses incurred, and the remainder "to be equally divided between my three children, or in the event of "death of either then in manner before mentioned."

The testator appointed his brother William Peter Reynolds, Henry Colls Richardson, and Edward A. D. Opie, three of the Defendants, his executors. On January 3rd, 1883, the testator made a codicil to his will which did not affect the matters in question in this action. The testator died on February 12th, 1883, and his will and codicil were duly proved by the executors named in the will. The testator was at his death possessed of considerable real estate and a large sum of money invested on mortgages and in bank stock.

Nicholson for the Plaintiffs.

Mathews for the Defendants Reynolds, Richardson, and Opie.

Gwynne, for the other Defendants, referred to the case of *Greenwood* v. *Greenwood* (L.R. 5, Ch. Div., 954).

THE CHIEF JUSTICE—This is a case for the construction of a will which was very inartistically drawn. The testator and the gentlemen who assisted him had a very clear scheme in their heads, but they have not expressed it with the perspicuity which might have been expected and which was desirable in so complex a scheme as that which

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the testator formed for the distribution of his property. First, there are certain specific bequests and devises, as to which no difficulty occurs. There is a gift of certain real estate, but practically the real estate not previously specifically devised, including the house of the testator in which his widow had a life estate, is directed to be sold, and on the sale of the property the proceeds are to be divided amongst the testator's children; and on the death of either of them, the issue of any child so dying is to take the parent's share. So far there is not much difficulty. But a difficulty arises in respect of a direction contained in regard to the bulk of the personalty. The testator directed that his personalty, which is specifically mentioned, is to be invested, but he does not directly state what is to become of it. He says:—"To secure the carrying out of my bequests "to the persons before mentioned, all moneys I have invested "on mortgage or other securities, together with all moneys to my "credit at the Savings or other Banks, together with all debts "recoverable due to me, shall be invested on mortgage or other secure "and profitable investment. Also, the shares I hold in the National "and Adelaide Banks; also, all profits derived from land and house-"hold property until sold, to be invested with other moneys until as "each grandchild becomes of age his or her share at the time shall be "paid with an admonition as to its careful and profitable use, seeing "that it cost their grandfather a lifetime of toil and care. The annual "interest or profit on the whole of the mortgaged or secured amounts "to be used first in paying the bequests before mentioned and any "necessary expenses incurred, and the remainder to be equally divided "between my three children, or in the event of death of either, then in manner before mentioned." Now, undoubtedly the wishes of the testator are not very clearly expressed, but when we come to look at the will, bearing out the principle laid down in the case to which Mr. Gwynne has very properly directed my attention, the meaning of the testator can be made out plainly enough. He has directed that the sum of £50 a year should be paid to his brother, and £52 to his wife, and that another sum of £52 should be placed to her credit in case of sickness or any other emergency. He says these bequests are to be provided for out of these investments, and then he proceeds, not in direct terms, but by implication, to state that he desired that the *corpus* shall be divided among his grandchildren. Then he goes on, oddly enough, to direct that the income shall be paid to his children. I understand the meaning to be this—That the income of these investments, subject

to these specific bequests, is to be paid to the children, and that on the death of either of the children the grandchildren take their shares of the income, and that ultimately the whole property is to be divided among the testator's grandchildren. The income goes *per stirpes*. I think the grandchildren who were living at the time of his death take their shares as they come of age. Two other questions have arisen. Although the real estate is given to the children immediately it is sold, yet, strange to say, until the sale takes place the rents and profits are to go into the personalty fund, in which the grandchildren participate. A question has arisen as to whether it is the whole or the net proceeds. I think it means after paying all necessary outgoings, because it speaks of profits. The last question is as to the accumulations of the £52 a year, which is left in the discretion of the trustees, to be paid to his wife to meet the case of sickness or other emergency. It appears to me that the unexpended part has to be accumulated, and that the sums which are not so spent, and the accumulation of interest thereon, will go to the testator's stepchildren. I hold therefore—1. That the children take the proceeds of sale of the real estate not otherwise specifically devised. 2. That the profits of the real estate go, until sale, into the general personalty to be invested. 3. That the children and their issue *per stirpes* take the income of the general fund, subject to the specific bequests, and that the grandchildren living at the time of the testator's death take the *corpus* by implication in equal shares *per capita*. 4. That the unexpended portion of the second £52 a year, disposable for the widow's benefit, at the discretion of the trustees, and the accumulations of interest thereon, go to the stepchildren. The costs of all parties, as between solicitor and client, will come out of the estate; and there will be liberty to apply.

FULL COURT
WAY, C.J., and BOUCAUT and BUNDEY, JJ.

In re FRASER.

Ex parte CROWE AND GARTRELL.

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Insolvent Act, No. 16, *of* 1860—*Deed of Assignment under Division* VI. *of Act—Sale by private treaty before expiration of ten days required by Insolvent Further Amendment Act, No.* 3 *of* 1870, *s.* 11—*Subsequent sale by tender instead of by auction—Misconduct of Trustee—Removal of Trustee of deed of Assignment, and appointment of new Trustee—Jurisdiction.*

Under s. 180 of the Insolvent Act, 1860, the Court has not jurisdiction to remove a trustee of a deed of assignment made under the provisions of Division VI. of such Act and to appoint a new trustee in his place, but where the trustee has been guilty of misconduct in realising the estate of the debtor and carrying out the trusts reposed in him by virtue of the deed of assignment, the Court will order an enquiry as to the loss occasioned by such misconduct, and order the trustee to pay the amount of the loss to the creditors.

AT a meeting of the creditors of James Fraser held on March 2nd, 1885, a proposition to pay 10s. in the £ was made on behalf of the debtor, and the meeting was adjourned for the purpose of ascertaining if all the creditors would assent to the proposal. At the adjourned meeting it was stated that the debtor's estate was worth more than 10s. in the £ to the creditors, and it was decided that the debtor should make an assignment of his estate to James Gartrell, of Adelaide, as trustee for the benefit of his creditors. On March 10th, 1885, the assignment was executed by the debtor, and on March 18th, 1885, before the ten days required by the Insolvent Further Amendment Act, No. 3, of 1870, s. 11, to expire before the estate be dealt with, had expired, Gartrell sold the whole of the debtor's estate, except some wheat, to his (Gartrell's) partner, Peter Wood, for the sum of £105. Wood immediately resold the property to the debtor, and took a bill of sale to secure the repayment of the sum of £200 alleged to be due by the debtor to Wood. On these facts becoming known to J. H. Crowe, a creditor, he communicated with Gartrell and suggested that the sale to Wood was improper and should be cancelled and the property be put up for sale by public auction; Gartrell refused to take any steps in the matter, but subsequently consented to the sale to Wood being cancelled, and offered the property of the debtor (except some land held by him on credit agreements for sale by tender instead of by auction, and ultimately sold the same to a relation of Fraser's. Crowe thereupon applied to the Court of Insolvency to remove Gartrell from the trusteeship;

but the Commissioner of Insolvency refused to remove him, and dismissed the application with costs.

The Commissioner of Insolvency delivered the following judgment: —In considering the terms of this application it was of the utmost importance that the trustees under this assignment should understand that their position was one requiring the exercise of the strictest fidelity, and that everything they did must be in the interest of the creditors, and all fair and above board. As far as the point of being too early was concerned, that appeared to have been assented to by a majority of the creditors, and though it might be a disobedience of the Act, it would be difficult to bring home the blame to Gartrell for trying to realise the estate as soon as possible. As to the sale to a partner the impropriety of that had been admitted. This was known to Mr. Crowe through his solicitor. The sale was now insisted upon and, notwithstanding that the moneys paid by Mr. Wood appear to have been handed back for the purpose of cancelling the contract, the Court must take into consideration that prior case of indiscretion for .the purpose of saying whether Gartrell should be removed or not. He had put the estate back in the same position as when he took it in hand, but now after assenting to that arrangement the parties applying sought to remove him on the ground that he had not done exactly what they wanted. The Court must find some improper conduct on the part of the trustee before he would be removed, and was there any such shewn? No doubt if he had insisted upon the original sale he might have placed the creditors in a different position. Gartrell was practically in possession of the estate as trustee, with the exception of eighty or ninety bags of wheat sold, and it was for him to realise it. There was no right of interference with his administration unless it was shewn to the utmost satisfaction of the Court that he was dealing with the estate in a manner prejudicial to the interests of the creditors. As to the wheat affair, there appeared to be a considerable dereliction of duty. It was the trustee's duty to have that wheat in his hands for sale, but it was in evidence that the value had been guaranteed. So far as the wheat was concerned Gartrell had undertaken to make himself responsible. I have been trying to find what the special improper conduct of Gartrell warranting his removal was, and I cannot fix upon anything. Mr. Crowe, on whose behalf the application was made, was the person who after notice that the estate was not being dealt with properly sought to get a com-

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mission out of it. As to the question of costs, I consider that the evidence has been most unnecessarily voluminous and the appointments before the Registrar needlessly prolonged. The application will be dismissed with costs against Crowe.

Crowe thereupon appealed from the decision of the Commissioner.

The Attorney-General (*J. W. Downer, Q.C.*) and *P. F. Bonnin* for the Appellant—The trustee has been guilty of improper conduct in selling the estate to his partner. He has not acted *bona fide*, and should be removed from the trusteeship. The estate should have been offered for sale by public auction, and the refusal to sell in that way and subsequently selling by tender was improper. The question of jurisdiction was not taken in the Court below, and should not be taken here.

Symon, Q.C., and *T. Pope* for Gartrell, the trustee—There was no contention in the Court below as to the *bonâ fides* of the trustee. The sale to Wood was wrong but has been cancelled, and the Court would not remove a trustee on that ground alone. The removal of a trustee is in the discretion of the Court of Insolvency. *Griffiths and Holmes*, vol. 2, 828, *Ex parte Bates* (1 De G., M. & G). This Court, if it has jurisdiction, will not interfere with the discretion of a Court of inferior jurisdiction unless it is shewn that the discretion has been wrongfully exercised—Insolvent Act 1860, s. 97; but we say—1. The Court of Insolvency has no jurisdiction to remove a trustee of a deed of assignment. 2. If it has power to remove, then the Court of Equity is the only Court which can appoint a new trustee, and there is no person in whom the debtor's estate would vest between the removal by the Court of Insolvency and the appointment by the Court of Equity. The Court will not allow this to happen.

The Attorney General in reply—The position of a trustee under a deed of assignment is precisely the same as under insolvency; the Court has full power to remove a trustee and to appoint a new one—Insolvent Act, 1860, s. 180. Pending the appointment of a new trustee the estate would vest in the official receiver—Insolvent Act, 1860, s. 99.

WAY, C.J. WAY, C.J., delivered the judgment of the Court—The first question that arises in this case is one that was not taken in the Court below, namely, whether the Court of Insolvency has jurisdiction to remove trustees and appoint new ones in the case of deeds under Division vi. of the Insolvent Act of 1860. If that

jurisdiction exists it is by virtue of the language of s. 180 of that Act, which has been cited again and again during the argument. The learned Attorney-General's contention is that some of the sections under the heading of the Act beginning at s. 94 "with respect to the choice of assignees, their rights and duties," are applicable to trustees, and that others are not. Now, it must be admitted that the whole of those sections cannot be said to be applicable whilst there are others which undoubtedly do apply to trustees under a deed of assignment, as well as to assignees under an act of insolvency. The difficulty in making up our minds conclusively on this question is that arising under s. 99, which provides, *inter alia*, that "if no assignee of the insolvent's estate shall "be chosen or appointed by the creditors, or where the sole creditor's "assignee under any insolvency shall die, resign, or be removed, and no "assignee be chosen in his stead, the official assignee shall become and be "the sole assignee." The learned Attorney-General's argument is that on the removal of the trustee the whole of the estate and effects which pass under the deed vest in the official assignee once and for all. That is to say, that the estate is transferred from the trustee appointed by the deed to the official assignee, in whom the duties imposed on the trustee by virtue of the actual deed thereupon become vested. It appears to us, without entering into a minute investigation of the provisions of the Act, that that was not the intention of the legislature. The intention of the legislature was to provide with respect to estates passing under insolvency, for the official administration of such estates, tempered, if I may so express it, by the assistance of the creditors' assignee. The intention of Division vi. was to place the administration of the estate in the hands of the trustee appointed first by the deed and not to have it administered by the official appointed by the first administration to which I have referred. That appears to us the broad intention of the legislature, and we think we should be departing from their intention and altogether defeating the object they had in view if we were to hold that by these terms of reference contained in s. 180 the estate was to be taken out of the hands of the trustee appointed by the creditors and placed exclusively under official administration. We think that that view of the original Act is altered in no wise by the provisions of Act 3 of 1870, s. 11, which gives power to the majority of creditors to substitute a new trustee for the trustee appointed by the deed. We think that the object of that section was to give the creditors

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interested a voice in the matter. The trustee named in the deed was really the nominee of the debtor; and it was manifestly unfair that the estate should be wound up by a person nominated by the debtor if he had not the approval of the creditors, and therefore the legislature provided means for substituting the nominee of the creditors for the nominee of the debtor. That appears to us to be the scope of the principal and of the amending Acts. The framers of the amending Acts, regarding it as desirable that the assignee in cases of insolvency should be liable to be removed by the Court and another reappointed from time to time, if any hiatus occurred between the appointments, decided that the estate should become vested in the official assignee, whose office now vests in the official receiver. As Mr. Symon pointed out, there is still the jurisdiction of a Court of Equity to remove and to appoint a new trustee in the event of the deed not being satisfactorily executed. Therefore we have come to the conclusion that the Court below had not jurisdiction upon this application to remove the trustee nominated in the deed, or to appoint a new trustee in his place. But it does not follow that no order should have been made on the application. The careful enquiry, at which the trustee was represented, elicted that although the trustee under the deed had apparently no means of benefiting himself—and therefore Mr. Bonnin's disclaimer of any imputation of actual fraud was only candid and proper—it was shewn conclusively that the estate was being manipulated, not for the purpose of providing as large a sum as could be obtained by its realisation for distribution among the creditors, but for the purpose of retransferring to the debtor with as little trouble as possible the assets which had been conveyed to the trustee. It appears to us that the conduct of the trustee throughout was vexatious in the highest degree. First, there was this hole-and-corner sale before the time allowed by the Act, and when it was pointed out that the estate ought to have been sold by auction, there was an obstinate refusal to allow it to be sold in that manner and an offering of it by private tender. We think, therefore, that an order should have been made by the Court below to redress these grievances to which the attention of the Court was directed by the complaining creditor. The trustee should have been ordered to bring the money, the value of the wheat, into Court, and he should have been directed to sell the land, a duty which appears to have altogether dropped from his consideration. There should have been an endeavour to realise on the land as well as on the other assets by

auction, and we think there should have been an enquiry as to the loss occasioned to the estate by this breach of trust on the part of the trustee, and that he should have been ordered to pay the amount of loss to the creditors. The order made by the Court of Insolvency will be, therefore, reversed and the following order will be made: — 1. That the value of the wheat which passed by the deed shall be paid into the Court. 2. That the estate be sold by public auction, with sufficient notice, and subject to the approval of the Court below. 3. We find the trustee guilty of neglect, and order him to pay any loss occasioned thereby. 4. That the applicant have his costs in this Court and the Court below paid by the trustee.

APPENDIX.

THE UNITED INSURANCE COMPANY *v.* COTTON.

THE following is the judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The United Insurance Company *v.* Cotton from the Supreme Court of South Australia; delivered July 3rd, 1885. The facts will be found reported in XVIII. S.A.L.R. Present—Lord Watson, Sir Barnes Peacock, Sir Robert Collier, Sir Richard Couch, and Sir Arthur Hobhouse:—

The Respondent Cotton was appointed to act as agent for the Appellants, in the colony of South Australia, by a power of attorney under the seal of the Company, dated 16th June, 1880. He was thereby authorised to represent the Company in the colony, and to accept, in their name, maritime risks on goods and other insurable interests, such risks beginning or ending in the colony, and also risks on the hulls of vessels duly registered in the colony. Instructions, bearing date the 23rd June, 1880, were issued, by the directors and manager, giving him information as to the limit up to which he was to be at liberty to insure particular risks.

On the 30th March, 1882, the Respondent took over a portion of an insurance effected by the Adelaide Marine and Fire Insurance Company upon a cargo of wheat to be shipped in the *Duke of Sutherland*, from Timaru, in New Zealand, to the United Kingdom or the Continent of Europe. The amount which he thus accepted, professedly as agent for the Company, was a sum not exceeding £1,000. As the loading of the cargo was not yet completed the precise amount of the insurance remained for after adjustment, but it was not to exceed that sum. That insurance complied with the instructions in this respect that it was below the limit allowed in the case of grain vessels; but the Company object to the insurance, and maintain that it is not binding upon them, upon the ground that it was effected by the Respondent outside of what is termed throughout these proceedings his jurisdiction. The risk was neither to com-

mence nor to end in the colony of South Australia. The Company through their London agent had to pay the policy. The agent paid in ignorance of the real state of matters, and this action was brought by the Company for recovery from Cotton of the sum of £821 10s., which represents the amount of the insurance money as finally adjusted with an additional sum paid for exchange.

It is not disputed that if the authority of Cotton rested upon the power of attorney and relative instructions he exceeded his powers as agent, but the pith of his defence is stated on the pleadings in these words: "The Defendant asserts that by their letters and their "conduct the Plaintiffs (that is the Appellant Company) induced "him to believe that he was at liberty to take the risk on the said "*Duke of Sutherland* and induced him to act on that belief, and that "the Plaintiffs are thereby estopped from asserting in this action "that the Defendant exceeded his authority."

The case went to trial before Mr. Justice Boucaut and a jury, and occupied their time upon the 8th, 10th, and 11th July, 1884. At the conclusion of the trial the jury, after being charged by Mr. Justice Boucaut, returned a verdict for the Defendant; but the Judge refused to enter up judgment upon that verdict because at the time he took the view that there was no evidence to sustain it, although, to save expense, in a possible event of the case, he permitted it to go to the jury. The three questions which he put to the jury were these:—"Did the Plaintiff Company by the course of dealing between "them and the Defendant authorise him as their agent to accept the "risk on the *Duke of Sutherland?* Secondly: Did the Plaintiffs "by their conduct induce the Defendant to believe that he was "authorised to accept the risk on the *Duke of Sutherland?* and, "thirdly: Did the Defendant act on a belief so induced?" According to the argument addressed to the Court below, which found favor with the Judges of the Supreme Court, the two last of these questions are those upon which the present case really turns. No objection has been taken to the conduct of the Judge at the trial, and no objection has been taken to the reception of evidence. So that their Lordships must assume that the case was properly submitted to the jury, if there be evidence from which the jury were reasonably entitled to draw an inference of fact in favor of the Defendant.

Their Lordships entertain no doubt that there is evidence which was properly submitted to the jury; but it does not follow that the verdict of the jury upon the evidence must be sustained. The real

question is whether that evidence is, as the Court below thought, such that the jury might reasonably find for the Defendant.

Their Lordships have heard a very able argument founded upon a great many minutiæ in the evidence which has been read, and which is wholly documentary, so far as it appears to their Lordships to be of any importance. But the question between the parties appears to their Lordships to turn upon the effect of two or three documents at the most.

Shortly after the agency of Mr. Cotton commenced, a question arose as to the propriety of his insuring wool from the sheeps' back to the vessel which was to convey it across the sea. There does not seem to have been any controversy as to this, or any doubt that insurances of that kind were entirely beyond his power; but the Company were induced to give him authority to make such insurances, on the representation made by him that it was necessary in their interest, in order to secure the business they were desirous to carry on. However, the fact that they authorised a new and distinct risk, not contemplated by the power, can really be of no consequence in the present case. No inference can be drawn to the effect that, because they enlarged his power in one direction, therefore they did so in another.

A more important feature of the case begins with the controversy as to the insurances upon the cargo of the *Invercauld*. That was a vessel loading at Adelaide, and an agent in Melbourne, trespassing upon the jurisdiction of Mr. Cotton, effected an insurance over her cargo on behalf of the Company. Mr. Cotton did not feel inclined to put up quietly with the intrusion, and some correspondence followed which terminated in the letter of the 6th January, 1881, to which their Lordships have been so frequently referred. In that letter Mr. Watkins, the manager of the Company, said: "My instructions "to all our agents is not to accept any risks beyond their own juris- "diction, except they have first ascertained, beyond a doubt, that we "have nothing on the same risks taken either here or at another "agency." In terms that it is an instruction to all the agents of the Company, to the effect that, if they can discover that the agent in another jurisdiction has no insurance upon a particular risk, they are at liberty to effect an insurance upon it provided they observe in other respects the limits and terms of their instructions. Then an illustration is given. "For instance, if Mel- "bourne is offered a line on a vessel loading at Adelaide for

"London the agents must ascertain if you are likely to be on the "same vessel. If so they must either decline the proposal or take "out a cover in Melbourne sufficient to protect us from any loss over "our limit. They ought then to ask you to advise them of the "amount accepted in Adelaide." There seems to be nothing unreasonable in that adjustment of the terms upon which agents in one jurisdiction might exceed their powers of attorney and instructions and effect insurances in another; and it obviously might be very much for the interest of the Company that they should have such a power, else insurances upon an Adelaide vessel offered at Melbourne might be lost to the Company. But the importance of this document is that it refers to all agents and it speaks of "any risks." It is not "agents other than you," but all agents including you. It is not the risk of wool, but it is any risk—wool, grain, general cargo, or hull. Of course a more limited construction may be put upon it. Their Lordships merely desire to indicate that the wider construction is one which might, in their estimation, be reasonably put upon it by the person to whom it was addressed. That it did disclose to Mr. Cotton when he received it some new ideas as to his method of conducting business is obvious from the terms of his answer. He says: "*Invercauld*"—that is the heading of the paragraph in his letter of the 13th January, 1881—"This misapprehension about this ship "arose from this being the first Adelaide vessel that had come under "my notice as being, in the first place, in the hands of your Mel- "bourne agents. Of course I see the propriety of your method of "business, and expect to be guided by it in future." That is as distinct an intimation as could well be given to the Company that he was going to act against outside agents and other jurisdictions according to the method in which they had authorised their Melbourne agent to deal with his insurances in his jurisdiction. If that arrangement was never put an end to or in some way qualified by what followed, it would be quite sufficient to authorise the insurance effected by the Appellant on the cargo of the *Duke of Sutherland* upon the 30th March, 1882, because he acted in reverse circumstances towards New Zealand in precisely the same manner as the Melbourne agent had done to South Australia in the case of the *Invercauld*.

But then followed, in March 1881, the case of the *Fiona*. The *Fiona* was outside his jurisdiction, but he was offered an insurance. He telegraphed to the Company, but it is better to take the terms of

his letter. He wrote them in these terms: "The *Fiona* at Geelong. "The 'Adelaide Marine' have the whole of her cargo of wheat, and "offer me £2,000. As my instructions do not refer to vessels in the "ports of another colony I have telegraphed yourself for instruc- "tions. As the wheat is a full cargo, in bags, your reply will "probably be, 'Take £1,500.' This vessel is described as a first-class "iron ship." Now that does show unquestionably that at the time when he wrote that letter Mr. Cotton had lost sight of, or at least had not clearly before him, the terms of the Company's letter of the 6th January and his own answer made to it on the 13th January, 1881. The instructions which they sent him were these: "You may retain £1,500 in *Fiona* provided Mel- "bourne has nothing. Should our Melbourne agents have any- "thing by the above ship it will, of course, be necessary "for you to re-insure, Geelong being out of your jurisdiction." Why "of course?" They refer to that as a matter of course, which he ought to know; and if there be any meaning in the reference, must it not be to their own letter of the 6th January? because what they say in their reply is simply a re-affirmance of what they said in their letter of the 6th, which was in substance this:—"If you do "keep the risk, Geelong being out of your jurisdiction, the onus of "re-insuring lies upon you." In other words, if the Geelong agent has a sum which, together with yours, brings the insurances above our limit, you must reduce it to the limit, and not the agent of the proper jurisdiction.

Therefore it does not appear to their Lordships to be matter of necessary inference from the terms of that transaction, that the arrangement contemplated and affirmed in the letters of the 6th and 13th January, 1881, was at an end, and if that inference is rejected this incident of the *Fiona* becomes rather a confirmation of the terms of the letter of the 6th.

There is one other document only which it is necessary to notice, and that is a letter of the 16th November, 1881. The statement in that letter is of some importance:—"Grain ships. You will adhere "to the terms of your instructions in regard to this class of risk." If there had been nothing else in the letter than these words, there would have been plausible grounds for maintaining that it conveyed to the Appellant a distinct intimation that all other arrangements made during the currency of the agency between his principals in Sydney and himself were at an end, and that from thenceforth the

terms of the power of attorney and the instructions issued with it were to govern their relations and his acts. But it is impossible to sever that language from the context in which it occurs; and the first sentence, "Please observe that in future you are at liberty to take "£4,000 on wool and general produce in first-class ships to London "from any of the ports named in Class A," and the whole subject-matter of the letter down to the words referring to grain ships, is an alteration of limit upon the risks. They were authorising him to add to and enlarge the limit of risks at all South Australian ports except Adelaide, by £500, in the case of wool and general produce. Nothing could be more natural than that, in order to put a stop to any doubt upon the subject, they should warn him that they do not intend that extension of limit to apply to grain ships, and it might reasonably be read as a warning to that effect merely, by a person who perused the letter, because it is a well recognised canon of construction, that general words, may have a very limited meaning impressed upon them when they occur apparently as a rider upon the subject-matter of the letter.

It is a circumstance which their Lordships cannot entirely disregard, that in the Court below the Judge who tried the case, and who refused to enter judgment upon the verdict, altered his opinion upon a deliberate consideration of the terms of the letter of 6th January 1881; and after hearing counsel fully instead of refusing to give judgment, he joined with his two brethren in affirming that the jury might reasonably put upon the correspondence the construction which they indicated by their verdict. It ought rather to be said that the Judge who had presided at the trial agreed with one of his brethren, because the other Judge goes the length of saying that he approved of the verdict, and had he sat as a juryman would have concurred in it.

In these circumstances it does not appear to their Lordships that it is possible to overturn this verdict on the only ground on which they could set it aside, namely, that no honest jury could reasonably come to the conclusion which is affirmed by the verdict; and they will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed and the Appeal dismissed, the Appellants paying the costs of the Respondent.

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